16B C.J.S. Constitutional Law § 1284

Corpus Juris Secundum | June 2021 Update

Constitutional Law
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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

A. Discrimination by Reason of Race, Color, Ethnicity, or Creed

2. Particular Matters

§ 1284. Discrimination in elections and voting; redistricting

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3278(7), 3284, 3285

Racial or ethnic discrimination in the electoral process generally is violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

The Equal Protection Clause of the Fourteenth Amendment guarantees the right to full participation in the political life of a community to racial minorities.[1] Thus, racial or ethnic discrimination in the electoral process is a violation of such constitutional protection.[2]

The Equal Protection Clause protects ethnic, as well as racial, groups from an invidious dilution of voting power.[3] The focus of a claim of racially discriminatory vote dilution is whether minority voters are denied the opportunity to participate effectively in the political process and not just whether they are officially permitted to register and vote under the law.[4] In order to be violative of equal protection of the laws, however, a claim of a racially discriminatory vote dilution scheme requires the establishment of a discriminatory intent or purpose[5] chargeable to the state.[6] In this context, discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.[7]

Drawing of legislative or congressional districts.

Those who claim that a legislature has improperly used race as a criterion in drawing a legislative district must show, at a minimum, that the legislature subordinated traditional race-neutral districting principles to racial considerations.[8] Race must not simply have been one motivation but the predominant factor motivating the legislature's districting decision.[9]

Redistricting legislation that is so bizarre on its face that it is unexplainable on grounds other than race may demand the same strict scrutiny given to other state laws that classify citizens by race.[10] A racially gerrymandered districting scheme, like all laws that classify citizens on the basis of race, is constitutionally suspect under the Equal Protection Clause even if the reason for the racial classification is benign or remedial.[11] However, a state can defeat a claim that a district has been gerrymandered on racial lines by showing that traditional districting principles or other race-neutral considerations are the basis for the challenged redistricting legislation and are not subordinated to race.[12]

The same proof of conscious racial discrimination required to show a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution is also required in Fifteenth Amendment cases.[13] Plaintiffs alleging that an alignment or redistricting has violated their rights under the Fourteenth and Fifteenth Amendments must prove intentional racial discrimination and that such intentional racial discrimination had an actual discriminatory effect.[14] However, racial discrimination need not be the sole motive behind the action challenged, but rather, it need only be one of the motivating factors but for which the action would not have been taken.[15]

The fact that congressional districts are created with a view to satisfying the prohibition in the Voting Rights Act against vote dilution, do not involve "racial subjugation," and may in a sense be "benignly" motivated, does not exempt those districts from strict scrutiny if they are challenged as racial gerrymandering.[16] Moreover, a congressional reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression, which is the principle underlying the preclearance requirement of the Voting Rights Act, and, thus, would not satisfy strict scrutiny when the plan is challenged as racial gerrymandering, if the State has gone beyond what was reasonably necessary to avoid retrogression.[17]

CUMULATIVE SUPPLEMENT

Cases:

Since the Equal Protection Clause restricts consideration of race and the Voting Rights Act (VRA) demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to competing hazards of liability. U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2, 52 U.S.C.A. § 10301. Abbott v. Perez, 138 S. Ct. 2305 (2018).

The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans, preventing a State, in the absence of sufficient justification, from separating its citizens into different voting districts on the basis of race. U.S.C.A. Const.Amend. 14. Cooper v. Harris, 137 S. Ct. 1455 (2017).

Assuming that complying with the VRA was a compelling interest for racial gerrymandering in legislative redistricting, State did not have a strong basis in evidence for believing that it needed to draw a congressional district as an African-American majority-minority district in order to avoid liability under § 2 of VRA for vote dilution, and thus, there was an equal protection violation under strict scrutiny because such racial gerrymandering was not narrowly tailored to State's objective; electoral history provided no evidence that a § 2 plaintiff could demonstrate effective white block-voting that usually would be sufficient to defeat the preferred candidate of African-Americans, as one of the prerequisites for vote dilution claim, and there was no

meaningful legislative inquiry into whether a new district with an enlarged population, that was created without a focus on race, could lead to § 2 liability. U.S.C.A. Const.Amend. 14; Voting Rights Act of 1965, § 2(a), 52 U.S.C.A. § 10301(a). Cooper v. Harris, 137 S. Ct. 1455 (2017).

Finding of three-judge District Court that racial gerrymandering rather than political gerrymandering was predominant factor motivating state legislature's decision to place a significant number of African-American voters within a particular district, for congressional redistricting, was not clearly erroneous, and thus, strict scrutiny for equal protection violation was required; district was approximately the right size before redistricting, racial lines were followed in further slimming down district and adding a couple of knobs to its snakelike body, addition of 35,000 African-American voters and subtraction of 50,000 white voters produced sizeable jump in black voting-age population (BVAP) from 43.8% to 50.7%, and architects of redistricting plan repeatedly described the influx of African-American voters into the district as a measure to ensure preclearance under § 5 of VRA, not a side-effect of political gerrymandering. U.S.C.A. Const.Amend. 14; 28 U.S.C.A. §§ 1253, 2284(a); Voting Rights Act of 1965, § 5, 52 U.S.C.A. § 10304. Cooper v. Harris, 137 S. Ct. 1455 (2017).

The constitutional violation in racial gerrymandering cases stems from the racial purpose of state action, not its stark manifestation, because the Equal Protection Clause does not prohibit misshapen electoral districts, and instead it prohibits unjustified racial classifications. U.S.C.A. Const.Amend. 14. Bethune-Hill v. Virginia State Bd. of Elections, 137 S. Ct. 788 (2017).

The racial predominance inquiry for a racial gerrymandering claim under the Equal Protection Clause concerns the actual considerations that provided the essential basis for the lines drawn for electoral districts, not post hoc justifications the legislature in theory could have used but in reality did not. U.S.C.A. Const.Amend. 14. Bethune-Hill v. Virginia State Bd. of Elections, 137 S. Ct. 788 (2017).

Where a challenger to an electoral redistricting plan alleges a conflict between the enacted plan and traditional redistricting criteria, or succeeds in showing one, the court should not confine its analysis to the conflicting portions of the lines for a district, because the basic unit of analysis for racial gerrymandering claims in general, and for the racial predominance inquiry in particular, is the district; thus, courts evaluating racial predominance should not divorce any portion of the lines, whatever their relationship to traditional redistricting principles, from the rest of the district. U.S.C.A. Const.Amend. 14. Bethune-Hill v. Virginia State Bd. of Elections, 137 S. Ct. 788 (2017).

Courts evaluating racial gerrymandering claims under the Equal Protection Clause can consider evidence pertaining to an area that is larger or smaller than the electoral district at issue; districts share borders, after all, and a legislature may pursue a common redistricting policy toward multiple districts. U.S.C.A. Const.Amend. 14. Bethune-Hill v. Virginia State Bd. of Elections, 137 S. Ct. 788 (2017).

District court clearly erred in finding that arguments made by Louisiana state legislators who opposed a proposal for a majority-minority judicial subdistrict were pretext for intentional racial discrimination, in action by African-American voters asserting claims under § 2 of Voting Rights Act (VRA), equal protection, and the Fifteenth Amendment, relating to use of at-large voting system for election of judges to state court in parish-wide judicial district; applying the presumption of good faith afforded to state legislatures, it was reasonable for legislators to be concerned about traditional districting principles and the prejudicial effects of racial gerrymandering if an additional judgeship for the district was elected from a newly-created non-contiguous majority-minority subdistrict. U.S. Const. Amends. 14, 15; Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301. Fusilier v. Landry, 963 F.3d 447 (5th Cir. 2020).

Proof of racially discriminatory intent or purpose is required to show that a voting law violates the Equal Protection Clause, although racial discrimination need only be one purpose, and not even a primary purpose, of an official action for a violation to occur. U.S. Const. Amend. 14. Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016), petition for certiorari filed (U.S. Sept. 23, 2016).

District court's findings that historical background and legislative history, for state's criminal statute prohibiting third parties from collecting early ballots from voters, did not reflect racially discriminatory intent were not clearly erroneous, as factors for analyzing Fifteenth Amendment challenge; when state had been subject to preclearance under VRA, Department of Justice (DOJ) did not issue any objections to any statewide procedure for registration and voting, state enacted an independent redistricting commission to combat problems with discrimination in drawing statewide redistricting plans, legislative discussion focused on the danger of fraud, legislature heard testimony that other states had implemented similar security measures related to ballot collection, and the statute found support among some minority officials and organizations. U.S. Const. Amend. 15; Voting Rights Act of 1965 § 5, 52 U.S.C.A. § 10304; Ariz. Rev. Stat. Ann. §§ 16-542(D), 16-1005(H, I). Democratic National Committee v. Reagan, 904 F.3d 686 (9th Cir. 2018).

Black caucus and political party failed to explain why compelling state interest in complying with Sections 2 and 5 of Voting Rights Act required raising voting-age black population percentage in Senate District over eight points, or converting plurality-black District into majority-black district, and thus District did not survive strict scrutiny under Equal Protection Clause in racial gerrymandering action. U.S. Const. Amend. 14; Voting Rights Act of 1965 §§ 2, 5, 52 U.S.C.A. §§ 10301, 10304. Alabama Legislative Black Caucus v. Alabama, 231 F. Supp. 3d 1026 (M.D. Ala. 2017).

In a racial gerrymanding case under the Equal Protection Clause, alleging the separation of voters into different districts on the basis of race, the division of counties, municipalities, or precincts can be probative that an improper motive predominated, and if the legislature has split communities of interest or grouped areas with fractured political, social, and economic interests, that too may indicate that an improper motive predominated. U.S. Const. Amend. 14. Common Cause v. Rucho, 318 F. Supp. 3d 777 (M.D. N.C. 2018).

Congressional district in Texas constituted racial gerrymander, in violation of Equal Protection Clause and § 2 of Voting Rights Act (VRA), even though district remained unchanged in district court's interim redistricting plan, which was adopted without change by state legislature, where district court had previously found that legislature intentionally created district to deprive Hispanic voters in one county of their opportunity to elect a candidate of their choice and that their § 2 rights were essentially traded to Hispanics in another county without § 2 right, and legislature did not engage in any meaningful deliberation to cleanse away such discriminatory intent. U.S. Const. Amend. 14; Voting Rights Act of 1965 § 2, 52 U.S.C.A. § 10301. Perez v. Abbott, 274 F. Supp. 3d 624 (W.D. Tex. 2017), appeal dismissed, 2018 WL 410904 (U.S. 2018).

State's use of race in enacting legislative decision to return city to Texas legislative district was not narrowly tailored to achieve compelling government interest in reaching goal of 50 percent Spanish-speaking voter registration (SSVR) target in district, and thus constituted racial gerrymandering in violation of Equal Protection Clause; state articulated no interest that use of race might have served other than avoiding a potential Voting Rights Act (VRA) problem, no legislator or staffer evaluated racially polarized voting in district or decision's effect on Latino voting ability in district, and house representative who drafted amendment to plan did not consider any changes in election performance or how primary results could change. U.S. Const. Amend. 14; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973. Perez v. Abbott, 267 F. Supp. 3d 750 (W.D. Tex. 2017), appeal dismissed, 2018 WL 410903 (U.S. 2018).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 102 S. Ct. 3187, 73 L. Ed. 2d 896, 5 Ed. Law Rep. 58 (1982).

2 U.S.—Coalition for Ed. in Dist. One v. Board of Elections of City of New York, 370 F. Supp. 42 (S.D. N.Y. 1974), judgment aff'd, 495 F.2d 1090, 18 Fed. R. Serv. 2d 1263 (2d Cir. 1974).

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Validity of Residency and Precinct-Specific Requirements of State Voter Registration Statutes, 57 A.L.R.6th 419.

Validity of Statute Limiting Time Period for Voter Registration, 56 A.L.R.6th 523 §§ 4, 7, 11.

Validity of Statute Providing for Purging Voter Registration Lists of Inactive Voters, 51 A.L.R.6th 287 § 6.

Validity of Statute Requiring Proof and Disclosure of Information as Condition of Registration to Vote, 48 A.L.R.6th 181 §§ 10, 11.

3 U.S.—Lodge v. Buxton, 639 F.2d 1358 (5th Cir. 1981), judgment aff'd, 458 U.S. 613, 102 S. Ct. 3272, 73 L. Ed. 2d 1012 (1982); Perkins v. City of West Helena, Ark., 675 F.2d 201 (8th Cir. 1982), judgment aff'd, 459 U.S. 801, 103 S. Ct. 33, 74 L. Ed. 2d 47 (1982); Lowery v. Deal, 850 F. Supp. 2d 1326 (N.D. Ga. 2012), aff'd on other grounds, 506 Fed. Appx. 885 (11th Cir. 2013), cert. denied, 134 S. Ct. 266, 187 L. Ed. 2d 149 (2013).

Ariz.—Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Com'n, 220 Ariz. 587, 208 P.3d 676 (2009).

4 U.S.—Perkins v. City of West Helena, Ark., 675 F.2d 201 (8th Cir. 1982), judgment aff'd, 459 U.S. 801, 103 S. Ct. 33, 74 L. Ed. 2d 47 (1982).

5 U.S.—Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 102 S. Ct. 3187, 73 L. Ed. 2d 896, 5 Ed. Law Rep. 58 (1982).

Disenfranchisement of felons

U.S.—Simmons v. Galvin, 575 F.3d 24 (1st Cir. 2009).

Disenfranchisement of persons convicted of involving moral turpitude

A provision in a state constitution disenfranchising persons convicted of crimes involving moral turpitude violated equal protection principles where, even though on its face it was racially neutral, the original enactment was motivated by a desire to discriminate against blacks on account of race and where the provision had a racially discriminatory impact since its adoption.

U.S.—Hunter v. Underwood, 471 U.S. 222, 105 S. Ct. 1916, 85 L. Ed. 2d 222 (1985).

6 U.S.—Washington v. Finlay, 664 F.2d 913 (4th Cir. 1981).

7 U.S.—Backus v. South Carolina, 857 F. Supp. 2d 553 (D.S.C. 2012), judgment aff'd, 133 S. Ct. 156, 184 L. Ed. 2d 1 (2012).

8 U.S.—Easley v. Cromartie, 532 U.S. 234, 121 S. Ct. 1452, 149 L. Ed. 2d 430 (2001).

9 U.S.—Easley v. Cromartie, 532 U.S. 234, 121 S. Ct. 1452, 149 L. Ed. 2d 430 (2001).

Compactness of district

In the equal protection context, the compactness of an election district focuses on the contours of district lines to determine whether race was the predominant factor in drawing those lines.

U.S.—League of United Latin American Citizens v. Perry, 548 U.S. 399, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006).

Allegation sufficient

An allegation that race was the overriding and predominant factor in redistricting legislation was sufficient to state a claim upon which relief could be granted under the Equal Protection Clause regardless of whether the challenged district's shape was so bizarre that it was unexplainable other than on the basis of race.

U.S.—Miller v. Johnson, 515 U.S. 900, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995).

10 U.S.—Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993).

As to strict scrutiny of laws involving racial discrimination, see § 1282.

Regularity of congressional district shape not mandated

The Federal Constitution does not mandate regularity of congressional district shape, and neglect of traditional districting criteria is merely necessary, not sufficient, to require application of strict scrutiny; for strict scrutiny to apply, traditional districting criteria must be subordinated to race.

U.S.—Bush v. Vera, 517 U.S. 952, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996).

11 U.S.—Perez v. Texas, 891 F. Supp. 2d 808 (W.D. Tex. 2012).

12 U.S.—Miller v. Johnson, 515 U.S. 900, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995).

13 U.S.—Jeffers v. Clinton, 740 F. Supp. 585 (E.D. Ark. 1990).

As to denial, abridgement, or discrimination with respect to voting in elections because of race as violating the Fifteenth Amendment of the United States Constitution, see C.J.S., Elections § 14.

14 U.S.—Turner v. State of Ark., 784 F. Supp. 553 (E.D. Ark. 1991), judgment aff'd, 504 U.S. 952, 112 S. Ct. 2296, 119 L. Ed. 2d 220 (1992).

15 U.S.—Jeffers v. Clinton, 740 F. Supp. 585 (E.D. Ark. 1990).

16 U.S.—Bush v. Vera, 517 U.S. 952, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996).
As to strict scrutiny of laws containing suspect classifications, see § 1282.
Racial gerrymandering and vote dilution claims compared
A racial gerrymandering claim differs analytically from a vote dilution claim; whereas a "vote dilution claim" alleges that a state has enacted a particular voting scheme as a purposeful device to minimize or cancel out the voting potential of racial or ethnic minorities, that is, an action disadvantaging voters of a particular race, the essence of an equal protection claim for racial gerrymandering is that the State has used race as a basis for separating voters into districts.
U.S.—Miller v. Johnson, 515 U.S. 900, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995).

17 U.S.—Bush v. Vera, 517 U.S. 952, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996).

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

A. Discrimination by Reason of Race, Color, Ethnicity, or Creed

2. Particular Matters

§ 1285. Discrimination in public employment and contracts

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3272, 3289

Discrimination in one's occupation or employment on the basis of race or ethnic difference by a state or local government is a violation of the Equal Protection Clause.

Discrimination in one's occupation or employment on the basis of race or ethnic difference by a state or local government is a violation of the Equal Protection Clause.[1] In order to establish a violation of the Equal Protection Clause, a racially discriminatory intent or purpose must be shown as the motivating factor.[2] A disproportionate impact, while relevant, is not sufficient to establish a violation of the Fourteenth Amendment.[3]

A governmental classification based upon race with respect to business occupations or employment is a suspect classification which is therefore subject to the test of strict scrutiny.[4] Thus, such a classification must be justified by a compelling governmental interest,[5] and any racial classification must be designed to minimize its limiting effect upon the class which is thereby burdened.[6]

CUMULATIVE SUPPLEMENT

Cases:

County circuit court employee stated actionable claim under § 1983 for violation of her equal protection rights based on her religion and nationality, where employee had stated a hostile work environment claim under Title VII on those same grounds. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983; Civil Rights Act of 1964, § 717, 42 U.S.C.A. § 2000e–16. Huri v. Office of the Chief Judge of the Circuit Court of Cook County, 804 F.3d 826 (7th Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Langford v. City of Texarkana, Ark., 478 F.2d 262 (8th Cir. 1973); Everett v. Riverside Hose Co. No. 4, Inc., 261 F. Supp. 463 (S.D. N.Y. 1966).
Purposeful racial discrimination in public employment
U.S.—Hazelwood School Dist. v. U.S., 433 U.S. 299, 97 S. Ct. 2736, 53 L. Ed. 2d 768 (1977).
Equal opportunity to compete in market place
U.S.—Allen v. City of Mobile, 331 F. Supp. 1134 (S.D. Ala. 1971), judgment aff'd, 466 F.2d 122 (5th Cir. 1972).
Dismissal or suspension
(1) State officials must be given wide discretion in exercising judgment in the dismissal of employees, but exercise of such power cannot be done in a racially discriminatory manner.
U.S.—London v. Florida Dept. of Health and Rehabilitative Services Division of Family Services, 313 F. Supp. 591 (N.D. Fla. 1970), judgment aff'd, 448 F.2d 655 (5th Cir. 1971).
(2) Race cannot constitutionally serve as a motivating factor for a decision to suspend a person without pay or to refuse a contract renewal.
U.S.—Whiting v. Jackson State University, 616 F.2d 116 (5th Cir. 1980).

2 U.S.—Talbert v. City of Richmond, 648 F.2d 925 (4th Cir. 1981); Whiting v. Jackson State University, 616 F.2d 116 (5th Cir. 1980); Torres-Hicks v. Connecticut Housing Finance Authority, 575 F. Supp. 2d 393 (D. Conn. 2008); Hernandez v. Borough of Ft. Lee, 2010 WL 2346646 (D.N.J. 2010).
Race need not be sole factor
The plaintiff's race need only be a motivating factor in an adverse employment action, not necessarily the sole factor, for a plaintiff to succeed in a Fourteenth Amendment equal protection claim based on allegations of race discrimination in employment.
U.S.—Perry v. McGinnis, 209 F.3d 597, 2000 FED App. 0133P (6th Cir. 2000).

3 U.S.—Washington v. Davis, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976); Talbert v. City of Richmond, 648 F.2d 925 (4th Cir. 1981).

4 Cal.—Department of General Services v. Superior Court, 85 Cal. App. 3d 273, 147 Cal. Rptr. 422 (3d Dist. 1978).
As to strict scrutiny of racially discriminatory classifications, see § 1282.

5 U.S.—Navab-Safavi v. Broadcasting Bd. of Governors, 650 F. Supp. 2d 40 (D.D.C. 2009), aff'd, 637 F.3d 311 (D.C. Cir. 2011); Montana Contractors' Ass'n v. Secretary of Commerce, 460 F. Supp. 1174 (D. Mont. 1978).
Cal.—Hiatt v. City of Berkeley, 130 Cal. App. 3d 298, 181 Cal. Rptr. 661 (1st Dist. 1982).

6 Cal.—Hiatt v. City of Berkeley, 130 Cal. App. 3d 298, 181 Cal. Rptr. 661 (1st Dist. 1982).

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

A. Discrimination by Reason of Race, Color, Ethnicity, or Creed

2. Particular Matters

§ 1286. Discrimination in public employment and contracts—Affirmative action or racial preferences

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3252, 3272, 3289

Various affirmative action programs may be initiated in order to remedy past discrimination in public employment, without denying equal protection.

Minority employment preferences may be upheld, as against an equal protection violation claim, where prior constitutional or statutory violations have resulted in discrimination.[1] Various affirmative action programs may be initiated without denying equal protection.[2] While there is authority that state affirmative action programs which employ explicit racial classifications are subject to strict scrutiny under the Equal Protection Clause,[3] to the extent that a subcontractor compensation program, offering financial incentives to prime contractors on government projects for hiring disadvantaged subcontractors, is based on disadvantage, not race, it is subject to a relaxed equal protection scrutiny.[4] Moreover, the rational basis test, rather than the strict scrutiny test, was applied to a white applicant's claim that a state statute prohibiting the hiring of police officers over age 32 had a disproportionate impact on minorities and thus violated the Equal Protection Clause, inasmuch as the statute had an identical effect on racial minorities and nonminorities, and, even if it had a disproportionate impact, the legislature was not motivated by a racially discriminatory intent.[5]

In any event, before embarking on an affirmative action program, a public employer must ensure that there is convincing evidence that remedial action is warranted; that is, the employer must have sufficient evidence to justify the conclusion that there has been prior discrimination.[6] Moreover, the State must have a compelling interest in initiating such an affirmative action program.[7] Furthermore, even where a history of discrimination and continuing racial imbalance compels the remedial use of racial criteria, the means chosen to implement the compelling interest should be reasonably related to the desired end.[8] In addition, the remedy of minority preference formulated to rectify such discrimination must be sufficiently narrow[9] and carefully tailored.[10]

Once the government has shown that its decision to resort to explicit racial classifications survives strict scrutiny by being narrowly tailored to achieve a compelling interest, its program is no longer presumptively suspect under the Equal Protection Clause; it is not appropriate to automatically apply strict scrutiny a second time in determining whether an otherwise valid affirmative action program is underinclusive for having excluded a particular plaintiff.[11]

In an affirmative action program, the Equal Protection Clause does not require a state actor to grant preference to all ethnic groups solely because it grants preference to one or more groups.[12]

Footnotes

1 Cal.—Price v. Civil Service Com., 26 Cal. 3d 257, 161 Cal. Rptr. 475, 604 P.2d 1365 (1980).
Pa.—Chmill v. City of Pittsburgh, 488 Pa. 470, 412 A.2d 860 (1980).

2 U.S.—Detroit Police Officers' Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979); Valentine v. Smith, 654 F.2d 503 (8th Cir. 1981); Equal Employment Opportunity Commission v. American Tel. & Tel. Co., 419 F. Supp. 1022 (E.D. Pa. 1976), judgment aff'd, 556 F.2d 167 (3d Cir. 1977).
As to remedial legislation and affirmative action plans designed to remedy past discrimination, see § 1283.
Ordinance requiring use of women and minority subcontractors
An ordinance requiring public contractors to utilize women and minority subcontractors at certain specified percentages did not violate equal protection guarantees.
Wash.—Gary Merlino Const. Co. v. City of Seattle, 108 Wash. 2d 597, 741 P.2d 34 (1987).
A.L.R. Library
What Constitutes Reverse or Majority Race or National Origin Discrimination Violative of Federal Constitution or Statutes—Public Employment Cases, 168 A.L.R. Fed. 1.

3 U.S.—Jana-Rock Const., Inc. v. New York State Dept. of Economic Development, 438 F.3d 195 (2d Cir. 2006).
As to strict scrutiny of racial classifications, see § 1282.
Award of city contracts to "disadvantaged business enterprises"
U.S.—Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia, 6 F.3d 990, 3 A.D.D. 1117 (3d Cir. 1993).

4 U.S.—Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

5 U.S.—Donahue v. City of Boston, 371 F.3d 7 (1st Cir. 2004).

6 U.S.—Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 106 S. Ct. 1842, 90 L. Ed. 2d 260, 32 Ed. Law Rep. 20 (1986).
Necessity of factual predicate for minority set-aside program
To determine whether a state can establish a compelling interest in a minority business enterprise set-aside program, as is necessary for the program to survive an equal protection challenge, it is necessary to consider the factual predicate offered in support of the program.
Ohio—Ritchey Produce Co., Inc. v. Ohio Dept. of Adm. Serv., 85 Ohio St. 3d 194, 1999-Ohio-262, 707 N.E.2d 871 (1999).
Statistical and anecdotal evidence sufficient

Statistical and anecdotal evidence of a city's past racial discrimination in the hiring and promotion of police officers, resulting in a significant underrepresentation of African-American and Hispanic officers in the detective rank, established a compelling interest in remedial action, and thus, the city's affirmative action plan consisting of the use of race-based cutoff scores in a promotional exam did not violate equal protection.

U.S.—Majeske v. City of Chicago, 218 F.3d 816, 47 Fed. R. Serv. 3d 542 (7th Cir. 2000).

7 U.S.—Doores v. McNamara, 476 F. Supp. 987 (W.D. Mo. 1979).

Factual predicate insufficient to demonstrate compelling interest

A city failed to demonstrate a compelling government interest to justify a plan requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises" since the factual predicate supporting the plan did not establish the type of identified past discrimination in the city's construction industry that would authorize race-related relief.

U.S.—City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989).

Compelling governmental interest shown

The general assembly had a strong basis in the evidence to support its conclusion that a minority business enterprise (MBE) set-aside program was necessary to redress a pattern of discriminatory exclusion of minorities from state contracting opportunities, and thus, the general assembly had a compelling governmental interest for adopting the program as was necessary for the program to survive an equal protection challenge.

Ohio—Ritchey Produce Co., Inc. v. Ohio Dept. of Adm. Serv., 85 Ohio St. 3d 194, 1999-Ohio-262, 707 N.E.2d 871 (1999).

Lack of legitimate governmental interest in enacting hiring preference

A borough's hiring preference favoring Native Americans violated the state constitution's equal protection clause because the borough lacked a legitimate governmental interest to enact a hiring preference favoring one class of citizens at the expense of others and because the preference it enacted was not closely tailored to meet its goals.

Alaska—Malabed v. North Slope Borough, 70 P.3d 416 (Alaska 2003).

8 U.S.—Associated General Contractors of Massachusetts, Inc. v. Altshuler, 490 F.2d 9 (1st Cir. 1973).

9 Ala.—Arrington v. Associated General Contractors of America, 403 So. 2d 893 (Ala. 1981).

10 Ala.—Arrington v. Associated General Contractors of America, 403 So. 2d 893 (Ala. 1981).

Consideration of flexibility and duration of relief

To determine whether race-conscious relief under an affirmative action program is narrowly tailored to further the State's compelling interest, for equal protection purposes, the flexibility and duration of relief must be considered.

U.S.—Dallas Fire Fighters Ass'n v. City of Dallas, Tex., 885 F. Supp. 915 (N.D. Tex. 1995).

11 U.S.—Jana-Rock Const., Inc. v. New York State Dept. of Economic Development, 438 F.3d 195 (2d Cir. 2006).

12 U.S.—Jana-Rock Const., Inc. v. New York State Dept. of Economic Development, 438 F.3d 195 (2d Cir. 2006).

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16B C.J.S. Constitutional Law § 1287

Corpus Juris Secundum | June 2021 Update

Constitutional Law
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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

A. Discrimination by Reason of Race, Color, Ethnicity, or Creed

2. Particular Matters

§ 1287. Discrimination in jury selection and composition

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3306 to 3310, 3830, 3831, 3833

The exclusion of persons from jury service, by any method or system, solely because of race or color constitutes a denial of equal protection of the laws.

Racial discrimination by the state in jury selection offends the Equal Protection Clause.[1] That is, the exclusion of a state of persons from grand jury service or petit jury service, at least in criminal proceedings, solely because of race or color,[2] or the substantial underrepresentation of cognizable groups,[3] constitutes a violation of the constitutional guaranty of equal protection of the laws. The requirement of equal protection gives accused a right to have the charges against him or her considered by a jury in the selection of which no one has been included[4] or excluded[5] because of his or her race or color. Purposeful racial discrimination in the selection of a jury violates equal protection by denying the defendant a trial by a body composed of peers or equals of the person whose rights it is selected to determine.[6] Thus, criminal defendants in state courts may challenge discriminatory selections of grand and petit juries through the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[7]

Peremptory challenges.

The privilege to strike individual jurors through peremptory challenges is subject to the commands of the Equal Protection Clause.[8] Although a criminal defendant has no right to a petit jury composed in whole or in part of persons of his or her own race, the Equal Protection Clause bars a prosecutor from challenging potential jurors solely on account of their race[9] or on the false assumption that members of his or her race as group are not qualified to serve as jurors[10] or will be unable impartially to consider the State's case against a defendant of the same race.[11] However, racial identity between the objecting defendant and the excluded jurors does not constitute a relevant precondition for a challenge under the Equal Protection Clause.[12] The Equal Protection Clause also prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges;[13] a defendant may not exercise a peremptory challenge to remove a potential juror solely on the basis of the juror's race.[14]

The use of peremptory challenges by a private litigant in a civil case to exclude jurors on the basis of their race likewise violates the constitutional guarantee of equal protection.[15] Furthermore, equal protection requires that a civil litigant challenging a prospective juror peremptorily be made to give a reason for such action.[16]

The exclusion of even a single prospective juror for racial or comparable reasons violates the Equal Protection Clause.[17] Moreover, even where the exclusion of a potential juror is motivated in substantial part by constitutionally permissible factors such as the juror's age, the exclusion is a denial of equal protection if it is partially motivated as well by the juror's race.[18]

Right not to be excluded from jury.

Apart from the equal protection rights of the parties, an individual venireperson has an equal protection right not to be excluded from jury service on the basis of race.[19] Although a citizen does not have the right to sit on a particular petit jury, he or she does have the right not to be excluded from one in violation of the Equal Protection Clause,[20] and jurors excluded on the basis of their race have the legal right to bring suit on their own behalf.[21]

Remedy.

If a trial court determines that a potential juror is stricken for discriminatory reasons, the remedy is to quash the strikes and permit those members of the venire improperly stricken to sit on the jury if they otherwise would; this remedy vindicates the equal-protection rights both of the accused and the stricken venireperson.[22]

CUMULATIVE SUPPLEMENT

Cases:

The duty to confront racial animus in the justice system is not the legislature's alone; time and again, the Supreme Court has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system. U.S.C.A. Const.Amend. 14. Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017).

The Fourteenth Amendment prohibits the exclusion of jurors on the basis of race. U.S.C.A. Const.Amend. 14. Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017).

In an effort to ensure that individuals who sit on juries are free of racial bias, the Constitution at times demands that defendants be permitted to ask questions about racial bias during voir dire. U.S.C.A. Const.Amend. 14. Pena-Rodriguez v. Colorado, 137 S. Ct. 855 (2017).

Batson safeguards the equal protection rights of challenged prospective jurors and guarantees them the honor and privilege of participating in the nation's system of justice. U.S. Const. Amend. 5. Harte v. Board of Commissioners of County of Johnson, Kansas, 940 F.3d 498 (10th Cir. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Miller-El v. Dretke, 545 U.S. 231, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005).

2 U.S.—Hernandez v. State of Tex., 347 U.S. 475, 74 S. Ct. 667, 98 L. Ed. 866 (1954); U.S. v. Hanson, 472 F. Supp. 1049 (D. Minn. 1979), aff'd, 618 F.2d 1261, 5 Fed. R. Evid. Serv. 973 (8th Cir. 1980).
D.C.—Obregon v. U. S., 423 A.2d 200 (D.C. 1980).
La.—State v. Langley, 813 So. 2d 356 (La. 2002).

3 U.S.—Castaneda v. Partida, 430 U.S. 482, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977); Villafane v. Manson, 504 F. Supp. 78 (D. Conn. 1980), aff'd, 639 F.2d 770 (2d Cir. 1980).
D.C.—Obregon v. U. S., 423 A.2d 200 (D.C. 1980).
Mass.—Com. v. Bastarache, 382 Mass. 86, 414 N.E.2d 984 (1980).
Factors considered
A court considers absolute disparity figures on a case-by-case basis in determining whether intentional discrimination has resulted to a black defendant due to substantial underrepresentation of his or her race or identifiable group on a grand jury or petit jury venire; the percentage of blacks in the jury pool is considered in light of the percentage of eligible blacks in the county's population.
N.C.—State v. Hough, 299 N.C. 245, 262 S.E.2d 268 (1980).

4 U.S.—Cassell v. State of Tex., 339 U.S. 282, 70 S. Ct. 629, 94 L. Ed. 839 (1950).

5 U.S.—City of Mobile, Ala. v. Bolden, 446 U.S. 55, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980); Rose v. Mitchell, 443 U.S. 545, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979).
Wash.—State v. Johnson, 7 Wash. App. 445, 500 P.2d 1272 (Div. 2 1972).

6 Ind.—Minniefield v. State, 539 N.E.2d 464 (Ind. 1989).
Fundamental concern
The fundamental equal protection concern in jury selection is not whether there has occurred a proportional inclusion or proportional limitation on the jury panel but whether the selection process has consciously taken color into account.
La.—State v. Ball, 824 So. 2d 1089 (La. 2002).
Proportional representation not required
Under the Equal Protection Clause, a defendant in a criminal case has the right to require that the State not exclude from the jury members of his or her race, but fairness in selection has never been held to require proportional representation of races upon a jury, nor has the defendant any right to demand that members of his or her race be included.
U.S.—City of Mobile, Ala. v. Bolden, 446 U.S. 55, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980).
Protection applicable to any identifiable racial or ethnic group
The protection of the Equal Protection Clause of the United States Constitution, as regards equality in the jury-selection process, applies to any identifiable racial or ethnic group in the community which may be subject to prejudice and is not limited to blacks.
D.C.—Obregon v. U. S., 423 A.2d 200 (D.C. 1980).

7 U.S.—Hoyt v. State of Fla., 368 U.S. 57, 82 S. Ct. 159, 7 L. Ed. 2d 118 (1961); U.S. v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982).
Transfer of venue for jury selection purposes

A transfer of venue for jury-selection purposes based on racial demographics did not violate a defendant's rights to an impartial jury or equal protection in a prosecution for the murder of a black leader of a civil rights organization where the transferee county had the same or similar racial composition as the county where the defendant was indicted.

Miss.—De La Beckwith v. State, 707 So. 2d 547 (Miss. 1997).

8 U.S.—Ford v. Georgia, 498 U.S. 411, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991).

Hispanic challenge to exclusion of blacks

U.S.—U.S. v. Rodriguez, 935 F.2d 194 (11th Cir. 1991).

Purposeful exclusion prohibited

U.S.—Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (holding modified on other grounds by, Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)).

Ill.—People v. Evans, 186 Ill. 2d 83, 237 Ill. Dec. 118, 708 N.E.2d 1158 (1999).

A.L.R. Library

Use of peremptory challenges to exclude Caucasian persons, as a racial group, from criminal jury—post-Batson state cases, 47 A.L.R.5th 259.

9 U.S.—U.S. v. McAllister, 693 F.3d 572 (6th Cir. 2012).

Neb.—State v. Rowe, 228 Neb. 663, 423 N.W.2d 782 (1988).

10 U.S.—U.S. v. McAllister, 693 F.3d 572 (6th Cir. 2012).

11 Neb.—State v. Rowe, 228 Neb. 663, 423 N.W.2d 782 (1988).

12 U.S.—Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).

13 U.S.—Georgia v. McCollum, 505 U.S. 42, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992).

14 U.S.—U.S. v. Martinez-Salazar, 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000).

15 U.S.—Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991).

Exclusion of white jurors

U.S.—Sanchez v. Roden, 753 F.3d 279 (1st Cir. 2014).

16 U.S.—Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991).

17 U.S.—Winston v. Boatwright, 649 F.3d 618 (7th Cir. 2011).

18 D.C.—Robinson v. U.S., 890 A.2d 674 (D.C. 2006).

A.L.R. Library

Adoption and Application of "Tainted" Approach or "Dual Motivation" Analysis in Determining Whether Existence of Single Discriminatory Reason for Peremptory Strike Results in Automatic Batson Violation When Neutral Reasons Also Have Been Articulated, 15 A.L.R.6th 319.

19 Fla.—Nowell v. State, 998 So. 2d 597 (Fla. 2008).

20 U.S.—Powers v. Ohio, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991).

Tex.—State ex rel. Curry v. Bowman, 885 S.W.2d 421 (Tex. Crim. App. 1993).

21 U.S.—Carter v. Jury Commission of Greene County, 396 U.S. 320, 90 S. Ct. 518, 24 L. Ed. 2d 549 (1970).

22 Mo.—State v. Hampton, 163 S.W.3d 903 (Mo. 2005).

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16B C.J.S. Constitutional Law § 1288

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Constitutional Law
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2. Particular Matters

§ 1288. Discrimination in jury selection and composition—Proof of discrimination

Topic Summary | References | Correlation Table

West's Key Number Digest

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In order to establish a violation of the equal protection guaranty, the exclusion of jurors must be purposeful and intentional and because the persons excluded are of a particular race or color, and such discrimination must be proved rather than merely assumed or asserted.

In order to establish a violation of the equal protection guaranty, the exclusion of jurors must be purposeful or intentional and because the persons excluded are of a particular race or color.[1] Purposeful discrimination may not be assumed or merely asserted but rather must be proved.[2]

In order to establish a prima facie violation of equal protection in connection with jury selection, a defendant must show that an identifiable distinct class is involved and has been singled out for different treatment under the laws, as written or as applied,[3] that the class is substantially underrepresented in the source from which jurors are drawn[4] and that the jury selection system at issue is susceptible to abuse.[5] A purpose or intention to discriminate may be proved by systematic exclusion of eligible jurymen of the proscribed race[6] or by unequal application of the law to such an extent as to show intentional discrimination.[7]

A strong presumption of systematic exclusion is created when a cognizable group is excluded or underrepresented on the usual jury,[8] and evidence that a jury plan operates in such way as always to result in the complete and long-continued exclusion of any representative at all from a large racial group gives rise to an inference of systematic or purposeful racial discrimination sufficient to establish a prima facie case.[9]

Once a criminal defendant presents prima facie proof of discrimination, the burden of overcoming it rests on the State.[10] In determining whether a prosecutor's use of peremptory challenges violates the Equal Protection Clause, a defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race,[11] and once a prima facie showing has been made, the prosecutor has the burden to provide a race-neutral explanation for its challenges,[12] and finally the trial court must determine whether the defendant has met his or her burden of establishing purposeful racial discrimination on the part of the prosecution.[13] If the trial court determines, at the third step of the inquiry, that the prosecution's proffered reason for the peremptory challenge is merely pretextual and that a racial motive is in fact behind the challenge, the juror may not be excluded.[14]

CUMULATIVE SUPPLEMENT

Cases:

The party making the *Batson* equal protection challenge bears the ultimate burden of persuasion. U.S. Const. Amend. 5. Harte v. Board of Commissioners of County of Johnson, Kansas, 940 F.3d 498 (10th Cir. 2019).

When making a *Batson* challenge, a defendant must first make a prima facie showing that a peremptory challenge has been exercised on the basis of race, then, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question, and finally, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. U.S. Const. Amend. 14. Ex parte Phillips, 284 So. 3d 101 (Ala. 2018), cert. denied, 140 S. Ct. 184, 205 L. Ed. 2d 65 (2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—City of Mobile, Ala. v. Bolden, 446 U.S. 55, 100 S. Ct. 1490, 64 L. Ed. 2d 47 (1980).
Ark.—Waters v. State, 271 Ark. 33, 607 S.W.2d 336 (1980).
D.C.—Obregon v. U. S., 423 A.2d 200 (D.C. 1980).
N.C.—State v. Hough, 299 N.C. 245, 262 S.E.2d 268 (1980).

2 Nev.—Bishop v. State, 92 Nev. 510, 554 P.2d 266 (1976).
Tenn.—Dowlen v. State, 2 Tenn. Crim. App. 34, 450 S.W.2d 793 (1969).
Wash.—State v. Johnson, 7 Wash. App. 445, 500 P.2d 1272 (Div. 2 1972).

3 U.S.—Castaneda v. Partida, 430 U.S. 482, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977); Parker v. Phillips, 717 F. Supp. 2d 310 (W.D. N.Y. 2010).
La.—State v. Brown, 371 So. 2d 751 (La. 1979).
Mass.—Com. v. Bastarache, 382 Mass. 86, 414 N.E.2d 984 (1980).
S.C.—State v. Moultrie, 273 S.C. 532, 257 S.E.2d 730 (1979).

4 U.S.—Castaneda v. Partida, 430 U.S. 482, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977).
Mass.—Com. v. Bastarache, 382 Mass. 86, 414 N.E.2d 984 (1980).
S.C.—State v. Moultrie, 273 S.C. 532, 257 S.E.2d 730 (1979).

Substantial degree of underrepresentation over significant period

U.S.—Parker v. Phillips, 717 F. Supp. 2d 310 (W.D. N.Y. 2010); Alba v. Quarterman, 621 F. Supp. 2d 396 (E.D. Tex. 2008).

Proportional comparison

Plaintiff must compare the proportion of the group in the total population to the proportion called to serve as jurors.

U.S.—U.S. v. Rodriguez, 924 F. Supp. 2d 1108 (C.D. Cal. 2013).

5 U.S.—U.S. v. Hanson, 472 F. Supp. 1049 (D. Minn. 1979), aff'd, 618 F.2d 1261, 5 Fed. R. Evid. Serv. 973 (8th Cir. 1980); Parker v. Phillips, 717 F. Supp. 2d 310 (W.D. N.Y. 2010).

Mass.—Com. v. Bastarache, 382 Mass. 86, 414 N.E.2d 984 (1980).

N.C.—State v. Hough, 299 N.C. 245, 262 S.E.2d 268 (1980).

6 U.S.—Akins v. State of Tex., 325 U.S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692 (1945).

Cal.—Montez v. Superior Court, 10 Cal. App. 3d 343, 88 Cal. Rptr. 736 (2d Dist. 1970).

La.—State v. Chapman, 410 So. 2d 689 (La. 1981).

Elements of prima facie claim

To establish a prima facie claim of denial of equal protection in underrepresentation of a group on a petit jury panel, the defendant must establish a constitutionally cognizable group, substantial underrepresentation over a significant period of time, and a discriminatory purpose.

N.J.—State v. Bey, 129 N.J. 557, 610 A.2d 814 (1992), opinion supplemented on other grounds, 137 N.J. 334, 645 A.2d 685 (1994).

7 U.S.—Akins v. State of Tex., 325 U.S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692 (1945).

Cal.—Montez v. Superior Court, 10 Cal. App. 3d 343, 88 Cal. Rptr. 736 (2d Dist. 1970).

8 U.S.—Scott v. Walker, 358 F.2d 561 (5th Cir. 1966).

Mass.—Com. v. Bastarache, 382 Mass. 86, 414 N.E.2d 984 (1980).

Significant period of underrepresentation shown.

U.S.—Johnson v. Puckett, 929 F.2d 1067 (5th Cir. 1991).

Failure to show underrepresentation due to systematic exclusion

A black personal-injury plaintiff failed to establish that the use of voter registration lists for selecting jury pools violated the equal protection requirement that juries be selected from a representative cross-section of the community where he failed to show any underrepresentation due to a systematic exclusion of blacks in jury pools and where there was no proof that there had been any exclusion of jurors for any reason other than a mere failure to register to vote.

Ark.—Richardson v. Williams, 327 Ark. 156, 936 S.W.2d 752 (1997).

9 U.S.—Goins v. Allgood, 391 F.2d 692 (5th Cir. 1968).

Showing of compelling governmental interest required

Where race was a predominant factor in excluding certain individuals from the jury wheel, pursuant to a jury selection plan which was challenged on equal protection grounds, the action had to be justified by a compelling governmental interest, and the means chosen had to be narrowly tailored to meet that interest.

U.S.—U.S. v. Ovalle, 136 F.3d 1092, 1998 FED App. 0060P (6th Cir. 1998).

10 U.S.—Avery v. State of Ga., 345 U.S. 559, 73 S. Ct. 891, 97 L. Ed. 1244 (1953).

La.—State v. Jones, 408 So. 2d 1285 (La. 1982); State v. Brown, 371 So. 2d 751 (La. 1979).

Mass.—Com. v. Bastarache, 382 Mass. 86, 414 N.E.2d 984 (1980).

S.C.—State v. Moultrie, 273 S.C. 532, 257 S.E.2d 730 (1979).

Evidence of racial discrimination sufficient under burden-shifting analysis

A habeas corpus petitioner established by a preponderance of the evidence that the prosecutor's decision to exercise peremptory strikes against one or more African-American members of the jury venire at the petitioner's trial was motivated by racial discrimination violative of the Fourteenth Amendment, under the burden-shifting analysis of *Batson v. Kentucky*, where the parties stipulated that the prosecutor struck at least six black women, the prosecutor's videotaped lecture described in detail a strategy of systematically excluding certain types of black jurors, and nothing in the record indicated that those jurors were stricken solely because they fit into one of the prosecutor's race-neutral disfavored categories.

U.S.—Wilson v. Beard, 314 F. Supp. 2d 434 (E.D. Pa. 2004).

11 D.C.—Evans v. U.S., 682 A.2d 644 (D.C. 1996).

Member of a cognizable racial group

The defendant is required to make a prima facie showing that he or she is a member of a cognizable racial group and that the government exercised peremptory challenges to remove from the venire members of the defendant's race.

U.S.—Yee v. Duncan, 463 F.3d 893 (9th Cir. 2006).

12 Ark.—Clay v. State, 290 Ark. 54, 716 S.W.2d 751 (1986).

D.C.—Evans v. U.S., 682 A.2d 644 (D.C. 1996).

Tenn.—State v. Hugueley, 185 S.W.3d 356 (Tenn. 2006).

13 D.C.—Evans v. U.S., 682 A.2d 644 (D.C. 1996).

14 Tenn.—State v. Hugueley, 185 S.W.3d 356 (Tenn. 2006).

Offered reasons rejected as pretextual

Fla.—Nowell v. State, 998 So. 2d 597 (Fla. 2008).

Determination of pretext

In determining whether the prosecutor's stated reason for challenged peremptory strikes is pretextual, a court must examine the totality of the relevant facts in employing the *Batson* burden-shifting analysis of whether the strikes were racially discriminatory in violation of the Fourteenth Amendment.

U.S.—Wilson v. Beard, 314 F. Supp. 2d 434 (E.D. Pa. 2004).

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

A. Discrimination by Reason of Race, Color, Ethnicity, or Creed

2. Particular Matters

§ 1289. Discrimination in regard to crimes and punishments

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3297 to 3304

The constitutional guarantee of equal protection generally precludes any state action which discriminates between persons of different races or colors, as to crimes or punishments therefor.

A person of a particular race, accused of a crime, is entitled to the equal protection of the law.[1] One of the animating purposes of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and a continuing principle of its jurisprudence, is the eradication of racial considerations from criminal proceedings.[2] The Equal Protection Clause embraces a right to be free from racially discriminatory enforcement of a state's criminal laws.[3] In cases alleging violations of equal protection due to racially animated law enforcement, the defendant must show both discriminatory effect and that the officer's action was motivated by a discriminatory purpose.[4] Thus, an officer's discriminatory motivation for stopping a vehicle, because of the race or ethnicity of its occupants, can give rise to an equal protection claim.[5] Also, the use of police force, in a disproportionate manner, to intimidate and harass an establishment and its patrons because of race violates the Equal Protection Clause.[6]

Prosecutors must exercise their charging discretion within constitutional constraints, including those imposed by the equal protection component of the Due Process Clause of the Fifth Amendment of the United States Constitution,[7] and when a prosecutor has deliberately based the prosecution upon a racial standard, the prosecutor's decision violates the Equal Protection Clause of the Fourteenth Amendment.[8]

Where racial classifications are embodied in a criminal statute, the courts must be especially sensitive to the policies of the Equal Protection Clause,[9] and a statute or ordinance is void as a denial of such protection which makes a particular act a crime when committed by a person of one race but not when committed by a person of another race.[10] The fact that a general evil will be partially corrected may at times, and without more, serve to justify the limited application of a criminal law, but legislative discretion to employ the piecemeal approach stops short of permitting a state to narrow statutory coverage to focus on a racial group.[11]

When a statute is not facially discriminatory but instead in its application has a disproportionate impact on a particular group of persons, a person challenging the statute must show that the legislature intended the statute to have the resulting effect or that it has maintained the statute in effect because of its impact on a particular group.[12]

Police inaction.

The Equal Protection Clause may apply to police inaction if the police decline to perform their duties because of the race, ethnicity, or national origin of the member of the public to be protected.[13]

Punishments.

Under the constitutional guarantee of equal protection, a person may not be subjected to any greater or different punishment for a criminal offense because of his or her race or color.[14] However, a statute permitting the imposition of the death penalty does not violate equal protection in the absence of proof of a racially discriminatory intent or purpose in its application.[15]

Prisons.

The Fourteenth Amendment prohibits racial discrimination within prisons,[16] and the prohibition extends to the racial segregation of inmates.[17] On the other hand, in circumstances of racial tension, racial separation brought about by policies founded exclusively on a bona fide, colorblind concern for the safety of prisoners does not violate equal protection.[18]

CUMULATIVE SUPPLEMENT

Cases:

Heck doctrine barred § 1983 claim against state officials, asserted by juvenile offenders who were convicted of first-degree murder and sentenced to life in prison without possibility of parole, and who were awaiting resentencing under Michigan's new statutory sentencing scheme allowing prosecutors to seek life-without-parole sentences for juveniles convicted of first-degree homicide crimes by filing a motion specifying grounds for imposing that punishment, alleging that Eighth Amendment categorically prohibited sentences of life without parole for juvenile offenders; a ruling that sentencing of life without parole for juvenile offenders was unconstitutional would necessarily implicate duration of the offenders' impending sentences by imposing a ceiling. U.S. Const. Amend. 8; 42 U.S.C.A. § 1983; Mich. Comp. Laws Ann. §§ 750.316, 769.25, 791.234(6)(a). Hill v. Snyder, 878 F.3d 193 (6th Cir. 2017).

Rational basis review applied to motorist's equal protection claim alleging discrimination based on ethnicity or national origin, relating to city's policy of offering only in English physical coordination tests for motorists arrested for driving while intoxicated (DWI); policy was facially neutral and was not based on race, ethnicity, or national origin, and instead was based solely on a motorist's ability to speak and understand English, which, by itself, did not implicate a suspect class. U.S.C.A. Const.Amend. 14; McKinney's Const. Art. 1, § 11; McKinney's Vehicle and Traffic Law § 1192. People v. Aviles, 28 N.Y.3d 497, 46 N.Y.S.3d 478, 68 N.E.3d 1208 (2016).

[END OF SUPPLEMENT]

Footnotes

1 Fla.—Taylor v. State, 156 Fla. 122, 22 So. 2d 639 (1945).

2 U.S.—Miller v. State of N.C., 583 F.2d 701 (4th Cir. 1978).

Remarks by prosecutor

In a prosecution of a black man for interstate kidnapping and interstate transportation of a stolen motor vehicle, the prosecutor's statement in closing argument that "not one white witness has been produced in this case that contradicts (the victim's) position" required new trial in that the argument denied equal protection.

U.S.—Withers v. U.S., 602 F.2d 124 (6th Cir. 1979).

3 U.S.—Butler v. Cooper, 554 F.2d 645 (4th Cir. 1977).

Selective enforcement

(1) If race is the sole motivation underlying the use of a mobile data terminal to check automobile license plates, it is illegal under the Equal Protection Clause and state constitutional provisions on natural and inalienable rights and freedom from discrimination, and the evidence resulting from a subsequent stop must be suppressed.

N.J.—State v. Segars, 172 N.J. 481, 799 A.2d 541 (2002).

(2) Racially discriminatory selective law enforcement by a police officer in violation of the constitutional guarantee of equal protection may be inferred from evidence of the officer's pattern and method of performing traffic stops and arrests, relevant departmental policies and training governing the officer's conduct, failure to uniformly comply with the relevant training and supervisory instruction received, the questions presented and statements made by the officer to vehicle occupants, the specific events of the traffic stop at issue, and any other relevant information which may support an inference of discriminatory purpose in this context.

U.S.—U.S. v. Hare, 308 F. Supp. 2d 955 (D. Neb. 2004).

4 U.S.—U.S. v. Mason, 774 F.3d 824 (4th Cir. 2014); Njaka v. Wright County, 560 F. Supp. 2d 746 (D. Minn. 2008).

5 U.S.—U.S. v. Hare, 308 F. Supp. 2d 955 (D. Neb. 2004).

Consensual encounters and searches

Consensual encounters and searches may violate equal protection when they are initiated solely based on racial considerations.

U.S.—U.S. v. Travis, 62 F.3d 170, 1995 FED App. 0253P (6th Cir. 1995).

6 U.S.—Orgain v. City of Salisbury, 521 F. Supp. 2d 465 (D. Md. 2007), judgment aff'd in part, 305 Fed. Appx. 90 (4th Cir. 2008).

7 U.S.—U.S. v. Smith, 231 F.3d 800, 55 Fed. R. Evid. Serv. 1267 (11th Cir. 2000).

8 Md.—Tapscott v. State, 106 Md. App. 109, 664 A.2d 42 (1995), judgment aff'd, 343 Md. 650, 684 A.2d 439 (1996).

Neb.—State v. Gales, 269 Neb. 443, 694 N.W.2d 124 (2005).

No showing of differential among similarly situated persons

Defendant failed to show that the prosecutor's alleged racial bias tainted his capital murder prosecution, as would violate his equal protection rights; even assuming that the prosecutor made a statement that evinced

his racial animus, there was no showing that similarly situated individuals of a different race were not prosecuted.

U.S.—Cornwell v. Bradshaw, 559 F.3d 398 (6th Cir. 2009).

Statistical evidence insufficient to show discrimination

(1) Statistical evidence that, during the period from 1971 to 1977, 39% of eligible Native Americans were charged as habitual criminals while only 12.5% of eligible Caucasians were charged as habitual criminals was not sufficient to establish a prima facie case of unlawful discrimination in the application of a habitual criminal statute, where the sample was so small that had one fewer Native American been charged and one more eligible Caucasian been charged, virtually no disparity at all would have existed between those eligible in each class and those actually charged.

Neb.—State v. Bird Head, 204 Neb. 807, 285 N.W.2d 698 (1979).

(2) Statistics showing that a significant portion of juveniles transferred to superior court were black was insufficient to establish a prima facie showing that a juvenile-transfer statute violated equal protection, where the defendant juvenile made no argument that the statute, as applied, operated to discriminate against him on a racial basis, nor did he present any statistics showing how his statistics related to the percentage of crimes committed by black juveniles as a whole, or the seriousness of those crimes as compared to those attributable to individuals of other racial groups.

N.C.—State v. Green, 348 N.C. 588, 502 S.E.2d 819 (1998).

9 U.S.—Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967).

10 La.—State v. Devall, 302 So. 2d 909 (La. 1974).

11 U.S.—McLaughlin v. State of Fla., 379 U.S. 184, 85 S. Ct. 283, 13 L. Ed. 2d 222 (1964).

Racially disparate impact

Even if a criminal statute allowing minors to be tried as adults for committing particular offenses had a racially disparate impact, an equal protection challenge to the statute could not be analyzed under the strict scrutiny standard without sufficient proof that the legislature purposefully intended to racially discriminate in enacting it.

Ill.—People v. R.L., 158 Ill. 2d 432, 199 Ill. Dec. 680, 634 N.E.2d 733 (1994).

As to strict scrutiny of racially discriminatory classifications, generally, see § 1282.

12 Nev.—McNelton v. State, 111 Nev. 900, 900 P.2d 934 (1995).

13 U.S.—Grenier v. Stratton, 44 F. Supp. 3d 197 (D. Conn. 2014).

14 U.S.—Government of Virgin Islands v. Gereau, 16 V.I. 87, 592 F.2d 192 (3d Cir. 1979); U.S. v. Butler, 541 F.2d 730 (8th Cir. 1976).

Defendant not similarly situated

Based on the crimes of which they were convicted, an African-American defendant was not similarly situated to defendants in an allegedly similar case in which the prosecution did not seek the death penalty against three white defendants as required for defendant's equal protection claim.

U.S.—Keene v. Mitchell, 525 F.3d 461 (6th Cir. 2008).

15 U.S.—Smith v. Balkcom, 671 F.2d 858 (5th Cir. 1982); Keene v. Mitchell, 525 F.3d 461 (6th Cir. 2008).

Ala.—Seals v. State, 282 Ala. 586, 213 So. 2d 645 (1968).

Fla.—Newman v. State, 196 So. 2d 897 (Fla. 1967).

16 U.S.—Inmates of Nebraska Penal and Correctional Complex v. Greenholtz, 436 F. Supp. 432 (D. Neb. 1976), judgment aff'd, 567 F.2d 1368 (8th Cir. 1977) and judgment aff'd, 567 F.2d 1381 (8th Cir. 1977); Saunders v. Packel, 436 F. Supp. 618 (E.D. Pa. 1977).

Magazine subscriptions

A refusal, based solely on race, to allow black prisoners to subscribe to nonsubversive black magazines violates the Fourteenth Amendment.

U.S.—Martin v. Wainwright, 525 F.2d 983 (5th Cir. 1976).

17 U.S.—Lee v. Washington, 390 U.S. 333, 88 S. Ct. 994, 19 L. Ed. 2d 1212 (1968); U.S. v. Wyandotte County, Kan., 480 F.2d 969 (10th Cir. 1973).

18 U.S.—Harris v. Greer, 750 F.2d 617 (7th Cir. 1984).

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16B C.J.S. Constitutional Law § 1290

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Constitutional Law
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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

A. Discrimination by Reason of Race, Color, Ethnicity, or Creed

2. Particular Matters

§ 1290. Discrimination in public facilities and accommodations

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3027, 3260, 3263, 3266, 3267, 3290

No statute, regulation, or other act expressing an affirmative state policy fostering racial discrimination or segregation in publicly operated facilities or accommodations will withstand a challenge under the Equal Protection Clause of the Fourteenth Amendment.

The guaranty of the equal protection of the laws operates as a protection against any state action, whether by statute or otherwise, which denies to a person equal use of public facilities and accommodations because of race or color or ethnic background.[1] Thus, no statute, regulation, or other act expressing an affirmative state policy fostering racial discrimination or segregation in publicly operated facilities will withstand a challenge under the Equal Protection Clause of the Fourteenth Amendment.[2]

Particular acts of discrimination and segregation involving public facilities and accommodations constitute discriminatory state action and are thus invalid under the Equal Protection Clause,[3] including acts of discrimination and segregation at courtrooms,[4] hospitals,[5] homes for the aged,[6] and public service facilities.[7] Likewise prohibited is discrimination in housing projects, financed in whole or in part with public funds,[8] restaurants,[9] and recreational facilities[10] such as golf courses[11] and parks.[12]

On the other hand, not every type of state or municipal entanglement in private racial discrimination or segregation at public facilities is sufficient to constitute a violation of the Equal Protection Clause.[13]

Footnotes

1 U.S.—Mitchell v. U.S., 313 U.S. 80, 61 S. Ct. 873, 85 L. Ed. 1201 (1941).

2 U.S.—Turner v. City of Memphis, Tenn., 369 U.S. 350, 82 S. Ct. 805, 7 L. Ed. 2d 762 (1962).
As to racial discrimination in public schools as violative of the constitutional guarantee of equal protection, generally, see § 1291.

3 U.S.—Harris v. City of Daytona Beach, 105 F. Supp. 572 (S.D. Fla. 1952).
Streets
A city's implementation of a traffic management plan, involving closing of bridges to vehicular traffic, during a black colleges reunion event, when the plan was not used during other events involving large crowds, violated the equal protection rights of reunion participants.
U.S.—Florida State Conference of NAACP Branches v. City of Daytona Beach, Fla., 54 F. Supp. 2d 1283 (M.D. Fla. 1999).
Sidewalks
Allegations by African-American licensed sidewalk vendors that they received no notice of new application procedure which restricted vending to certain locations in the city, whereas vendors who were not African-American did receive notice and that this was part of a deliberate plan on the part of the city, stated a claim for denial of equal protection entitling the African-American vendors to an evidentiary hearing in support of their motion for a preliminary injunction.
U.S.—Lindsay v. City of Philadelphia, 844 F. Supp. 229 (E.D. Pa. 1994).
Lease of land by city
Where a city, for a token fee, leased bottom land to a private yacht club for maintenance of dock facilities, which were essential to the continued existence of the club, the conduct of the city, as an arm of the state, constituted "state action" so as to bring the club's membership practices, which were discriminatory on the basis of race and religion, within the proscription of the Fourteenth Amendment.
U.S.—Golden v. Biscayne Bay Yacht Club, 521 F.2d 344 (5th Cir. 1975), on reh'g en banc on other grounds, 530 F.2d 16, 49 A.L.R. Fed. 563 (5th Cir. 1976).

4 U.S.—Wood v. Vaughan, 321 F.2d 480 (4th Cir. 1963).

5 U.S.—Cypress v. Newport News General and Nonsectarian Hospital Ass'n, 375 F.2d 648 (4th Cir. 1967).
Conn.—Connecticut Bank & Trust Co. v. Cyril and Julia C. Johnson Memorial Hospital, 30 Conn. Supp. 1, 294 A.2d 586 (Super. Ct. 1972).

6 U.S.—Small v. Hudson, 322 F. Supp. 519 (M.D. Fla. 1970).

7 U.S.—Dowdell v. City of Apopka, Fla., 511 F. Supp. 1375 (M.D. Fla. 1981), order aff'd, 698 F.2d 1181, 36 Fed. R. Serv. 2d 72 (11th Cir. 1983).

8 U.S.—Jones v. City of Hamtramck, 121 F. Supp. 123 (E.D. Mich. 1954).
Cal.—Banks v. Housing Authority of City and County of San Francisco, 120 Cal. App. 2d 1, 260 P.2d 668 (1st Dist. 1953).
N.J.—Taylor v. Leonard, 30 N.J. Super. 116, 103 A.2d 632 (Ch. Div. 1954).

9 U.S.—Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); Robinson v. State of Fla., 378 U.S. 153, 84 S. Ct. 1693, 12 L. Ed. 2d 771 (1964); Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed. 2d 45 (1961).

10 U.S.—Hadnott v. City of Prattville, 309 F. Supp. 967 (M.D. Ala. 1970).

11 U.S.—Beal v. Holcombe, 193 F.2d 384 (5th Cir. 1951).

12 U.S.—Wright v. State of Ga., 373 U.S. 284, 83 S. Ct. 1240, 10 L. Ed. 2d 349 (1963); Lopez v. Seccombe, 71 F. Supp. 769 (S.D. Cal. 1944).

13 U.S.—Falzarano v. U.S., 607 F.2d 506 (1st Cir. 1979).
As to discrimination in enforcement of private covenants and restrictions, see § 1297.
Declaration of failure of trust

A determination of the state supreme court that, because a public park could not be operated on a racially discriminatory basis, the intention of the testator, who left the property in trust for the creation of a public park for the exclusive use of white people could not be fulfilled and that accordingly the trust had failed and the trust property had reverted to the heirs of the testator, and the state court's refusal to apply the cy pres doctrine to the will, did not violate the right to equal protection.
U.S.—Evans v. Abney, 396 U.S. 435, 90 S. Ct. 628, 24 L. Ed. 2d 634 (1970).

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§ 1291. Discrimination in public schools

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3278(1), 3278(2), 3278(4), 3279, 3280(1) to 3280(4), 3281, 3615

The Equal Protection Clause of the Federal Constitution forbids state action of any kind which denies to any person equal accommodations in public schools because of race, color, or ethnic background.

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution forbids state action of any kind which denies to any person equal accommodations in public schools because of race, color, or ethnic background.[1] All persons, regardless of race or ethnic background, are entitled to equal educational opportunities.[2] In the field of public education, the doctrine of "separate but equal" has no place, since separate educational facilities are inherently unequal, and segregation of students in public schools on the basis of race, even though the physical facilities and other tangible factors are equal, deprives students of the minority group of equal educational opportunities and constitutes a denial of equal protection of the laws.[3] If a state perpetuates policies and practices traceable to a prior de jure segregation system that continue to have segregative effects, either by influencing student enrollment decisions or by fostering segregation in facets of a university system, and those policies lack a sound educational justification and can be practicably eliminated, the State fails to satisfy its burden of proving that it has dismantled its prior system and remains in violation of the Equal Protection Clause even if the State has abolished a legal requirement that whites and blacks be educated separately and has established racially neutral policies.[4] When school officials

have made a series of educational policy decisions which are based wholly or in part on considerations of the race of the students or teachers, and which have contributed to increasing racial segregation in the public school system, there has been a violation of the Fourteenth Amendment.[5]

Discriminatory intent.

In order to be unconstitutional, discrimination in the public schools must be the result of a discriminatory intent.[6] However, racial concerns need not be the dominant or primary factors.[7]

Footnotes

1 U.S.—Board of School Com'rs of Mobile County v. Davis, 84 S. Ct. 10, 11 L. Ed. 2d 26 (1963); Norris v. State Council of Higher Ed. for Va., 327 F. Supp. 1368 (E.D. Va. 1971), judgment aff'd, 404 U.S. 907, 92 S. Ct. 227, 30 L. Ed. 2d 180 (1971).

2 U.S.—Kalamazoo Board of Education v. Oliver, 421 U.S. 963, 95 S. Ct. 1950, 44 L. Ed. 2d 449 (1975).

Right to free education

Although a state is not required to provide the opportunity of free education for its inhabitants by the Federal Constitution where it has assumed that obligation the opportunity becomes a right which must be made available to all on equal terms.

U.S.—Liberty Curtin Concerned Parents v. Keystone Central School Dist., 81 F.R.D. 590 (M.D. Pa. 1978).

3 U.S.—Brown v. Board of Ed. of Topeka, Shawnee County, Kan., 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873, 38 A.L.R.2d 1180 (1954), supplemented, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, 71 Ohio L. Abs. 584 (1955).

Elements of de jure racial segregation claim

To prevail on a de jure racial segregation claim under the Equal Protection Clause, a plaintiff must show (1) action or inaction by public officials (2) with a segregative purpose (3) which actually results in increased or continued segregation in the public schools.

U.S.—Spurlock v. Fox, 716 F.3d 383, 293 Ed. Law Rep. 695 (6th Cir. 2013), cert. denied, 134 S. Ct. 436, 187 L. Ed. 2d 283 (2013).

4 U.S.—U.S. v. Fordice, 505 U.S. 717, 112 S. Ct. 2727, 120 L. Ed. 2d 575, 75 Ed. Law Rep. 81 (1992).

Diploma sanction

Absent a failure to demonstrate either that the disproportionate failure of black students on a functional literacy test required for a public high school diploma was not due to the present effects of past intentional segregation or, that as presently used, a diploma sanction was necessary to remedy those effects, the immediate use of the diploma sanction was impermissible as punishing black students for a deficiency created by the prior dual-school system.

U.S.—Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981).

5 U.S.—Cisneros v. Corpus Christi Independent School Dist., 467 F.2d 142 (5th Cir. 1972); Booker v. Special School Dist. No. 1, Minneapolis, Minnesota, 351 F. Supp. 799 (D. Minn. 1972); Hoots v. Com. of Pa., 359 F. Supp. 807 (W.D. Pa. 1973).

Necessary use of racial classifications to conduct research

A state university's interest in operating a laboratory elementary school to conduct research relevant to improvement of the state's public educational system through dissemination and eventual application of acquired knowledge was "compelling," despite the fact that the use of racial classifications to achieve racial distribution deemed necessary for the validity of the research did not remedy past discrimination, since the state interest in maintaining and improving the public school system was substantial and use of racial classifications to conduct the university's research was necessary.

U.S.—Hunter by Brandt v. Regents of the University of California, 971 F. Supp. 1316, 120 Ed. Law Rep. 705 (C.D. Cal. 1997), aff'd, 190 F.3d 1061, 138 Ed. Law Rep. 127 (9th Cir. 1999).

6 U.S.—Lora v. Board of Ed. of City of New York, 623 F.2d 248 (2d Cir. 1980).

No violation of equal protection rights shown

The chancellor of a city school system did not violate the equal protection rights of members of community school boards when he used his statutory authority to remove the members, allegedly for racial reasons, where there was no showing of intent to discriminate and there were nondiscriminatory reasons for the actions, based on evidence of malfeasance or misfeasance on the part of the members.

U.S.—Warden v. Pataki, 35 F. Supp. 2d 354, 133 Ed. Law Rep. 76 (S.D. N.Y. 1999), aff'd, 201 F.3d 430, 141 Ed. Law Rep. 154 (2d Cir. 1999).

Disparate impact insufficient

A complaint challenging relocation of a public community college with a significant minority student population to an allegedly inferior site failed to allege an equal protection violation absent a claim that the relocation was for the purpose of discriminating against such students; alleged disparate impact could not, in itself, support an inference of intentional discrimination.

U.S.—Capital Community College Student Senate v. Connecticut, 175 F. Supp. 2d 271, 160 Ed. Law Rep. 43 (D. Conn. 2001).

7 U.S.—Bell v. Board of Ed., Akron Public Schools, 491 F. Supp. 916 (N.D. Ohio 1980), judgment aff'd, 683 F.2d 963 (6th Cir. 1982).

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

A. Discrimination by Reason of Race, Color, Ethnicity, or Creed

2. Particular Matters

§ 1292. Discrimination in public schools—Particular matters

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3278(3), 3278(6), 3278(8), 3280(5)

The constitutional guarantee of equal protection is infringed upon where school districts are created or reorganized, or where sites are selected for the location of schools, in such a manner as to maintain or perpetuate segregation, or where the staff or faculty of schools are treated in a racially discriminatory manner.

Various decisions by faculties and administrators of public schools based on race or ethnic origin are reviewable under the Fourteenth Amendment.[1]

The creation or maintenance of school districts and boundaries, in such a manner as to cause or perpetuate racial discrimination or segregation, is in violation of the Equal Protection Clause of the Federal Constitution.[2] Thus, the use of authority by school officials to reorganize school districts violates the equal protection guaranty where it serves to perpetuate segregation.[3]

Under the equal protection guaranty, school authorities may not construct new schools or expand existing ones with the purpose of creating or preserving racial segregation of pupils.[4] Moreover, they may not select sites for new schools for the purpose and with the effect of incorporating in a school system existing residential racial segregation.[5]

Student discipline.

School officials violate the Equal Protection Clause when they punish a student more severely for his or her conduct than other students because of the student's race.[6]

Indifference to racial harassment of student.

To establish a school administrator's deliberate indifference to racial harassment, in violation of the Equal Protection Clause of the Fourteenth Amendment, a plaintiff must prove that: (1) the child in question was in fact harassed by other students based on his or her race; (2) such race-based harassment was actually known to the defendant school official; and (3) the defendant's response to such harassment was so clearly unreasonable in light of the known circumstances as to give rise to a reasonable inference that the defendant personally intended for the harassment to occur.[7]

Treatment of school staff members and faculty.

The staff and faculty members of a public school system are shielded by the Equal Protection Clause against discrimination in their employment because of their race.[8] Such protection applies to the selection,[9] assignment,[10] retention,[11] and dismissal[12] of school faculty and staff members.

In order to remedy the effects of past racial discrimination, school officials may be required to give affirmative consideration to racial factors in allocating faculty and staff members.[13]

Discrimination in educational financing system.

Any discriminatory classification found in a state's educational financing system cannot withstand scrutiny unless the State can demonstrate some compelling state interest to justify the unequal classification.[14] However, a statutory scheme for funding public education does not violate guarantees of equal protection under the state and federal constitutions, due to a disparate impact on minorities or other classes, where there is no showing that any disparate impact is related to a discriminatory purpose.[15]

CUMULATIVE SUPPLEMENT

Cases:

The Equal Protection Clause does not force universities to choose between a diverse student body and a reputation for academic excellence. U.S.C.A. Const.Amend. 14. Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016).

Under *McDonnell Douglas*, African–American state university student in Master's degree program who asserted discrimination in education on the basis of her race, in violation of equal protection, first had to establish a prima facie case of discrimination, requiring evidence that: (1) plaintiff was a member of a protected class, (2) she suffered an adverse action at the hands of the defendants in her pursuit of her education, (3) she was qualified to continue in her pursuit of her education, and (4) she was treated differently from similarly situated students who were not members of the protected class. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983. Thompson v. Ohio State University, 92 F. Supp. 3d 719 (S.D. Ohio 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 106 S. Ct. 1842, 90 L. Ed. 2d 260, 32 Ed. Law Rep. 20 (1986).

Dismissal of student based on race

U.S.—Thomas v. Gee, 850 F. Supp. 665, 91 Ed. Law Rep. 577 (S.D. Ohio 1994).

Extra-curricular activities

U.S.—Joyner v. Whiting, 477 F.2d 456 (4th Cir. 1973).

Denial of eligibility for athletic team

U.S.—Paschal v. Perdue, 320 F. Supp. 1274 (S.D. Fla. 1970).

School board elections

U.S.—Coalition for Ed. in Dist. One v. Board of Elections of City of New York, 370 F. Supp. 42 (S.D. N.Y. 1974), judgment aff'd, 495 F.2d 1090, 18 Fed. R. Serv. 2d 1263 (2d Cir. 1974).

2 U.S.—Hoots v. Com. of Pa., 359 F. Supp. 807 (W.D. Pa. 1973).

Creation of separate school units

U.S.—Turner v. Warren County Bd. of Ed., 313 F. Supp. 380 (E.D. N.C. 1970).

3 U.S.—Hoots v. Com. of Pa., 359 F. Supp. 807 (W.D. Pa. 1973).

School board redistricting plan

Strict scrutiny applied to a school board redistricting plan which replaced the at-large election of board members with irregular, race-based single member districts, which white voters alleged were the result of racial gerrymandering in violation of the constitutional guarantee of equal protection.

U.S.—Cannon v. North Carolina State Bd. of Educ., 917 F. Supp. 387, 107 Ed. Law Rep. 825 (E.D. N.C. 1996).

4 U.S.—Kalamazoo Board of Education v. Oliver, 421 U.S. 963, 95 S. Ct. 1950, 44 L. Ed. 2d 449 (1975).

Relocation of community college

A complaint challenging the relocation of a public community college with a significant minority student population to an allegedly inferior site failed to allege an equal protection violation, absent a claim that the relocation was for the purpose of discriminating against such students, and an alleged disparate impact could not, in itself, support an inference of intentional discrimination.

U.S.—Capital Community College Student Senate v. Connecticut, 175 F. Supp. 2d 271, 160 Ed. Law Rep. 43 (D. Conn. 2001).

5 U.S.—U.S. v. School Dist. 151 of Cook County, Ill., 301 F. Supp. 201 (N.D. Ill. 1969), order modified on other grounds, 432 F.2d 1147 (7th Cir. 1970).

6 U.S.—Heyne v. Metropolitan Nashville Public Schools, 655 F.3d 556, 272 Ed. Law Rep. 805 (6th Cir. 2011).

Discrimination not established

U.S.—Corales v. Bennett, 488 F. Supp. 2d 975, 221 Ed. Law Rep. 164 (C.D. Cal. 2007), aff'd, 567 F.3d 554, 244 Ed. Law Rep. 1045 (9th Cir. 2009); J.E. ex rel. Edwards v. Center Moriches Union Free School Dist., 898 F. Supp. 2d 516, 291 Ed. Law Rep. 116 (E.D. N.Y. 2012), appeal dismissed, 553 Fed. Appx. 68 (2d Cir. 2014).

7 U.S.—George v. Board of Educ. of the Tp. of Millburn, 34 F. Supp. 3d 442, 312 Ed. Law Rep. 713 (D.N.J. 2014).

Suicide

To succeed on an equal protection claim against a school district and its employees, parents of a student who committed suicide as result of alleged harassment and bullying by her classmates were required to show that the student suffered severe, pervasive, and objectively offensive harassment on the basis of her Bosnian nationality, and that the school officials participated in or advanced the discrimination either by discriminating themselves, or by deliberately ignoring known discrimination by other students.

U.S.—Vidovic v. Mentor City School Dist., 921 F. Supp. 2d 775, 294 Ed. Law Rep. 906 (N.D. Ohio 2013).

8 U.S.—Wall v. Stanly County Bd. of Ed., 378 F.2d 275 (4th Cir. 1967); Freeman v. Gould Special School Dist. of Lincoln County, Ark., 405 F.2d 1153 (8th Cir. 1969).

Discrimination in compensation

The equal protection guaranty protects faculty and staff of a public school against discrimination in compensation based on race.

U.S.—Clark v. Mann, 562 F.2d 1104 (8th Cir. 1977).

9 U.S.—Knowles v. Board of Public Instruction of Leon County, Fla., 405 F.2d 1206 (5th Cir. 1969); Spangler v. Pasadena City Bd. of Ed., 311 F. Supp. 501 (C.D. Cal. 1970); Roseboro v. Fayetteville City Bd. of Ed., 491 F. Supp. 113 (E.D. Tenn. 1978).

10 U.S.—Rolfe v. County Bd. of Ed. of Lincoln County, Tenn., 391 F.2d 77 (6th Cir. 1968); Spangler v. Pasadena City Bd. of Ed., 311 F. Supp. 501 (C.D. Cal. 1970); Roseboro v. Fayetteville City Bd. of Ed., 491 F. Supp. 113 (E.D. Tenn. 1978).

Right not violated

U.S.—Bell v. Board of Ed., Akron Public Schools, 491 F. Supp. 916 (N.D. Ohio 1980), judgment aff'd, 683 F.2d 963 (6th Cir. 1982).

11 U.S.—Wall v. Stanly County Bd. of Ed., 378 F.2d 275 (4th Cir. 1967).

Preferential protection against layoffs not justified

A school board's policy of extending preferential protection against layoffs to some employees because of their race could not be justified by the school board's interest in providing minority role models for its minority students.

U.S.—Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 106 S. Ct. 1842, 90 L. Ed. 2d 260, 32 Ed. Law Rep. 20 (1986).

12 U.S.—Franklin v. County School Bd. of Giles County, 360 F.2d 325 (4th Cir. 1966); Oliver v. Kalamazoo Bd. of Ed., 346 F. Supp. 766 (W.D. Mich. 1971), order aff'd, 448 F.2d 635 (6th Cir. 1971).

"Surplussing" of white employee

A school district's staff racial balancing requirements, to which a white teacher was subjected when he was "surplussed" based on changes in enrollment and corresponding reductions in teacher allocations, were not supported by a compelling interest in remedying past discrimination, and thus facially violated equal protection, despite the contention that the provisions were originally adopted to comply with the dictates of a consent decree and settlement agreement in a school desegregation case, as the consent decree and settlement agreement which had required racial balancing had expired.

U.S.—Perrea v. Cincinnati Public Schools, 709 F. Supp. 2d 628, 259 Ed. Law Rep. 660 (S.D. Ohio 2010).

13 U.S.—U.S. v. School Dist. 151 of Cook County, Ill., 286 F. Supp. 786 (N.D. Ill. 1968), order aff'd, 404 F.2d 1125 (7th Cir. 1968).

Faculty integration plan

Even in the absence of a finding of de jure segregation, the constitutional equal protection rights of teachers were not violated when a school district adopted a faculty integration plan which called for the mandatory reassignment of teachers based on race.

U.S.—Zaslawsky v. Board of Ed. of Los Angeles City Unified School Dist., 610 F.2d 661 (9th Cir. 1979).

Race-conscious provisions of consent decree

Race-conscious provisions of a proposed consent decree designed to remedy race discrimination in the promotion of professional educators in Alabama's postsecondary educational system, including numerical goals for employment of African-Americans in covered positions, did not violate equal protection where the race-conscious provisions were narrowly drawn and justified by a compelling interest of remedying past race discrimination.

U.S.—Shuford v. Alabama State Bd. of Educ., 846 F. Supp. 1511, 90 Ed. Law Rep. 194 (M.D. Ala. 1994).

14 W. Va.—State ex rel. Bd. of Educ. for County of Randolph v. Bailey, 192 W. Va. 534, 453 S.E.2d 368, 97 Ed. Law Rep. 530 (1994).

15 Kan.—Montoy v. State, 278 Kan. 769, 120 P.3d 306, 202 Ed. Law Rep. 319 (2005), opinion supplemented on other grounds, 279 Kan. 817, 112 P.3d 923, 198 Ed. Law Rep. 703 (2005).

Effect of prior system of segregation

The former operation of a higher education system by the State of Texas, in which students were segregated by law, did not impose upon the state a higher burden of proof, in an equal protection challenge to the allocation of educational resources in the Mexican border area, absent a showing that such allocation was in any way traceable to the prior system of segregation.

Tex.—Richards v. League of United Latin American Citizens (LULAC), 868 S.W.2d 306 (Tex. 1993).

End of Document

16B C.J.S. Constitutional Law § 1293

Corpus Juris Secundum | June 2021 Update

Constitutional Law
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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

A. Discrimination by Reason of Race, Color, Ethnicity, or Creed

2. Particular Matters

§ 1293. Discrimination in public schools—Race-conscious admissions programs; affirmative action

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3276, 3278(1), 3279, 3280(3)

An interest in achieving educational diversity can constitute a compelling state interest capable of supporting a narrowly tailored means, for purposes of determining whether a policy of using race in admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, but a race-conscious admissions program must not unduly burden individuals who are not members of the favored racial and ethnic groups.

The attainment of a diverse student body is a constitutionally permissible goal for an institution of higher education and ethnic diversity can be one element in a range of factors a university properly may consider in attaining the goal of a heterogenous student body.[1] A state university's interest in achieving educational diversity can constitute a compelling state interest capable of supporting a narrowly tailored means, for purposes of determining whether that university's policy of using race in undergraduate admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[2] In determining whether the means chosen by a university to attain diversity in admissions are narrowly tailored to that goal, the reviewing court must verify that it is necessary for the university to use race to achieve the educational benefits of diversity; this involves a careful judicial inquiry into whether the university could achieve sufficient diversity without

using racial classifications.[3] While narrow tailoring under the Equal Protection Clause does not require that a state university law school exhaust every conceivable race-neutral alternative to its race-conscious admissions program,[4] strict scrutiny does require the court to examine with care, and not defer to, the university's serious, good faith consideration of workable race-neutral alternatives that would achieve the diversity the university is seeking.[5] The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity, and if a nonracial approach could promote the substantial interest about as well and at a tolerable administrative expense, then the university may not consider race.[6] Moreover, to be narrowly tailored, as required by the Equal Protection Clause, a race-conscious admissions program must not unduly burden individuals who are not members of the favored racial and ethnic groups.[7] In reviewing, under the Equal Protection Clause, a university's choice of means to attain its goal of diversity, a court can take account of the university's experience and expertise in adopting or rejecting certain admissions processes, but it remains at all times the university's obligation to demonstrate, and the judiciary's obligation to determine, that admissions processes ensure that each applicant is evaluated as individual and not in way that makes an applicant's race or ethnicity the defining feature of his or her application.[8] Furthermore, race-conscious university admissions policies must be limited in time, since racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest asserted demands.[9]

If used by a state university, a race-conscious admissions program cannot employ a quota system, and it cannot insulate each category of applicants with certain desired qualifications from competition with all other applicants.[10] Instead, a university may consider race or ethnicity only as a plus in a particular applicant's file, without insulating the individual from comparison with all other candidates for the available seats.[11]

CUMULATIVE SUPPLEMENT

Cases:

The fact that race consciousness played a role in only a small portion of a public university's admissions decisions should be a hallmark of narrow tailoring, as required by equal protection, not evidence of unconstitutionality. U.S.C.A. Const.Amend. 14. Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016).

Because racial characteristics so seldom provide a relevant basis for disparate treatment, race may not be considered by a public university as part of an affirmative action admissions program unless the admissions process can withstand strict scrutiny under the equal protection clause. U.S.C.A. Const.Amend. 14. Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016).

No deference is owed when determining whether a public university's use of race as part of an affirmative action admissions program is narrowly tailored to achieve the university's permissible goals, as required by equal protection. U.S.C.A. Const.Amend. 14. Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016).

A public university that uses race as part of an affirmative action admissions program bears the burden, in action challenging the program on equal protection grounds, of proving a nonracial approach would not promote its interest in the educational benefits of diversity about as well and at tolerable administrative expense. U.S.C.A. Const.Amend. 14. Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016).

In determining whether a public university's use of race as part of an affirmative action admissions program is narrowly tailored to achieve the university's permissible goals as required by equal protection, though narrow tailoring does not require exhaustion of every conceivable race-neutral alternative or require a university to choose between maintaining a reputation for excellence and fulfilling a commitment to provide educational opportunities to members of all racial groups, it does impose on the university

the ultimate burden of demonstrating that race-neutral alternatives that are both available and workable do not suffice. U.S.C.A. Const.Amend. 14. Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016).

State university that used race-conscious admissions plan challenged on equal protection grounds had continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances; going forward, that assessment had to be undertaken in light of the experience the school had accumulated and the data it had gathered since the adoption of its plan. U.S.C.A. Const.Amend. 1. Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016).

State university articulated concrete and precise goals of its race-conscious admissions program amounting to "compelling interest" required by equal protection; university identified destruction of stereotypes, promotion of cross-racial understanding, preparation of a student body for an increasingly diverse workforce and society, and cultivation of a set of leaders with legitimacy in the eyes of the citizenry as educational values it sought to realize through its admissions process. U.S.C.A. Const.Amend. 14. Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016).

Through regular evaluation of data and consideration of student experience, state university that used race-conscious admissions plan challenged on equal protection grounds was required to tailor its approach in light of changing circumstances, ensuring that race played no greater role than necessary to meet its compelling interest in diversity. U.S.C.A. Const.Amend. 14. Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016).

In articulating its compelling interest in a race conscious admissions program challenged on equal protection grounds, state university was not required to precisely set forth the level of minority enrollment that would constitute a "critical mass"; although increasing minority enrollment may have been instrumental to the educational benefits of enrolling a diverse student body, it was not a goal that could be reduced to pure numbers. U.S.C.A. Const.Amend. 14. Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016).

State university's race-conscious admissions program, under which more than three-fourths of slots in incoming freshman class were filled by students who graduated in top 10% of their high school class, and remaining slots were filled using a holistic review process that treated race as a factor, did not violate equal protection; program was narrowly tailored to achieve university's goal of increasing diversity. U.S.C.A. Const.Amend. 14. Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016).

The compelling interest that justifies consideration of race in college admissions, as required by equal protection, is not an interest in enrolling a certain number of minority students; rather, a university may institute a race-conscious admissions program as a means of obtaining the educational benefits that flow from student body diversity. U.S.C.A. Const.Amend. 14. Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016).

A university's goals in adopting a race-conscious admission program cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them in an action challenging the program on equal protection grounds. U.S.C.A. Const.Amend. 14. Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016).

Evidence in action challenging state university's race-conscious admissions program on equal protection grounds was insufficient to establish that any alternatives were a workable means for the university to attain the benefits of diversity it sought; university already had intensified its outreach efforts to African–American and Hispanic applicants, created new scholarship programs, opened new regional admissions centers, increased its recruitment budget, and organized recruitment events, and had spent seven years attempting to achieve its compelling interest using race-neutral holistic review without success. U.S.C.A. Const.Amend. 14. Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016).

Equal protection did not require state university to achieve its goal of increasing student diversity by adopting admissions program that relied on class rank alone; even if minority enrollment would increase under such a regime, use of a single metric

would sacrifice other aspects of diversity and create perverse incentives for applicants. U.S.C.A. Const.Amend. 14. Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016).

Strict scrutiny under the equal protection clause as applied to a public university's affirmative action admissions program requires the university to demonstrate with clarity that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary to the accomplishment of its purpose. U.S.C.A. Const.Amend. 14. Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016).

Evidence regarding increase in minority enrollment following state university's adoption of a race-conscious admissions program was sufficient to establish that the program had meaningful impact on diversity of university's freshman class, as required by equal protection; Hispanic enrollment increased from 11% to 16.9% and African-American enrollment increased from 3.5% to 6.8%. U.S.C.A. Const.Amend. 14. Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016).

A public university bears a heavy burden in showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious admission plan in an action challenging the program on equal protection grounds. U.S.C.A. Const.Amend. 14. Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016).

Evidence in action challenging state university's race-conscious admissions program on equal protection grounds was sufficient to establish that university had not yet obtained educational benefits of diversity at time the program was adopted; studies conducted by university in good faith concluded that the use of race-neutral policies and programs had not been successful in achieving sufficient racial diversity, and demographic data showed consistent stagnation in terms of percentage of minority students enrolling during years before the program was adopted. U.S.C.A. Const.Amend. 14. Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Smith v. University of Washington, Law School, 233 F.3d 1188, 149 Ed. Law Rep. 347 (9th Cir. 2000).

2 U.S.—Gratz v. Bollinger, 539 U.S. 244, 123 S. Ct. 2411, 156 L. Ed. 2d 257, 177 Ed. Law Rep. 851 (2003).
Strict scrutiny required
For equal protection purposes, purposeful employment of racial and ethnic admissions criteria by a state university is a form of intentional discrimination requiring strict scrutiny regardless of the university's good faith in employing such criteria.
U.S.—Hunter by Brandt v. Regents of the University of California, 971 F. Supp. 1316, 120 Ed. Law Rep. 705 (C.D. Cal. 1997), aff'd, 190 F.3d 1061, 138 Ed. Law Rep. 127 (9th Cir. 1999).
As to strict scrutiny of classifications discriminating on the basis of suspect classifications such as race or ethnicity, see § 1282.

3 **No judicial deference**
U.S.—Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 186 L. Ed. 2d 474, 293 Ed. Law Rep. 588 (2013).

4 U.S.—Grutter v. Bollinger, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304, 177 Ed. Law Rep. 801 (2003).

5 U.S.—Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 186 L. Ed. 2d 474, 293 Ed. Law Rep. 588 (2013).

6 U.S.—Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 186 L. Ed. 2d 474, 293 Ed. Law Rep. 588 (2013).

7 U.S.—Grutter v. Bollinger, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304, 177 Ed. Law Rep. 801 (2003).

As to the general requirement that affirmative action plans be narrowly tailored to remedy past discrimination, see § 1283.

8 U.S.—Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 186 L. Ed. 2d 474, 293 Ed. Law Rep. 588 (2013).

9 U.S.—Grutter v. Bollinger, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304, 177 Ed. Law Rep. 801 (2003).

10 U.S.—Grutter v. Bollinger, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304, 177 Ed. Law Rep. 801 (2003).

11 U.S.—Grutter v. Bollinger, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304, 177 Ed. Law Rep. 801 (2003); Smith v. University of Washington, Law School, 233 F.3d 1188, 149 Ed. Law Rep. 347 (9th Cir. 2000).

Equal protection rights of Caucasian applicants violated

The equal protection rights of Caucasian applicants to the University of Michigan's undergraduate College of Literature, Science and the Arts were violated by the University's policy of automatically distributing 20 points, or one-fifth of those needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race; that policy was not narrowly tailored to the asserted compelling state interest in achieving educational diversity.

U.S.—Gratz v. Bollinger, 539 U.S. 244, 123 S. Ct. 2411, 156 L. Ed. 2d 257, 177 Ed. Law Rep. 851 (2003).

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16B C.J.S. Constitutional Law § 1294

Corpus Juris Secundum | June 2021 Update

Constitutional Law
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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

A. Discrimination by Reason of Race, Color, Ethnicity, or Creed

2. Particular Matters

§ 1294. Discrimination in public schools—Assignment or transfer of students to remedy past discrimination

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3278(4), 3278(5)

The assignment or transfer of students to schools on a racial basis in order to remove any vestiges of state-mandated segregation does not infringe upon equal protection.

Any student assignment,[1] or transfer[2] plan implemented by local school officials, whereby racial segregation is the inevitable consequence is violative of the Equal Protection Clause of the Fourteenth Amendment. Thus, classifications based upon race for the purpose of transfer between public schools, which have the effect of perpetuating segregation, violate the Equal Protection Clause.[3] However, the constitutional guarantee of equal protection does not preclude assignment or transfer of pupils to schools on a racial basis in order to remove vestiges of state-mandated segregation[4] or to achieve a greater racial balance.[5] In order to satisfy the searching standard of review applicable to individual racial classifications challenged under the Equal Protection Clause, school districts that use such classifications in their student assignment plans have to demonstrate that the use of racial classifications is narrowly tailored to achieve a compelling government interest.[6] Such school districts are also required to show that they considered methods other than explicit racial classifications to achieve their stated goals.[7]

Majority-to-minority transfers.

An optional majority-to-minority transfer provision, under which individuals may elect to transfer from a district in which they are members of the racial majority to a district in which they will be in the minority, is a useful part of a desegregation plan,[8] and the Equal Protection Clause does not prohibit such a plan.[9]

Attendance zones.

School officials electing to desegregate by using attendance zones have an obligation to draw the zones in such a manner as to eliminate the effects of past racial discrimination and to achieve desegregation,[10] and the general powers of school officials with respect to attendance zones are subject to the constitutional guarantee of equal protection.[11]

Neighborhood school concept.

Under a neighborhood assignment basis in a unitary system, the student must attend the nearest school whether it is a formerly white school or a formerly black school, and white students cannot be permitted to attend schools located greater distances from their home than schools where the student body is all black.[12] Such a plan, in itself, does not offend the Equal Protection Clause,[13] and when a school system has been declared unitary, a plaintiff must prove a racially discriminatory intent or purpose in order to establish a violation of equal protection principles.[14]

However, in a school system that has a history of state-imposed segregation, a neighborhood school plan which tends to promote separation of the races need not be preserved inviolate.[15] State action which prohibits school authorities from requiring any student to attend a school other than the one nearest to his or her home, but includes exceptions which permit the assignment of students away from their neighborhood schools for virtually all other purposes except racial integration, creates a racial classification in violation of equal protection.[16]

Busing.

Busing of pupils is neither required nor forbidden by the Equal Protection Clause of the Fourteenth Amendment.[17] Rather, it is only one possible tool in the implementation of a unitary school system.[18]

Footnotes

1 U.S.—Board of Managers of Ark. Training School for Boys at Wrightsville v. George, 377 F.2d 228 (8th Cir. 1967).

2 U.S.—Monroe v. Board of Com'rs of City of Jackson, Tenn., 391 U.S. 450, 88 S. Ct. 1700, 20 L. Ed. 2d 733 (1968); Booker v. Special School Dist. No. 1, Minneapolis, Minnesota, 351 F. Supp. 799 (D. Minn. 1972).
Mass.—Opinion of the Justices, 365 Mass. 648, 310 N.E.2d 348 (1974).

3 U.S.—Goss v. Board of Ed. of City of Knoxville, Tenn., 373 U.S. 683, 83 S. Ct. 1405, 10 L. Ed. 2d 632 (1963).

4 U.S.—Cunningham v. Grayson, 541 F.2d 538 (6th Cir. 1976).
Finding that district had achieved unitary status
Any interest in remedying the effects of past intentional discrimination could not serve as a compelling interest justifying a school board's use of racial classification in a student assignment plan for elementary school assignments and transfer requests, which was challenged under the Equal Protection Clause, where,

although the district's schools had been previously segregated by law and then subject to a desegregation decree, the decree had since been dissolved upon a finding that the district had achieved unitary status.

U.S.—Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 127 S. Ct. 2738, 168 L. Ed. 2d 508, 220 Ed. Law Rep. 84 (2007).

5 U.S.—McDaniel v. Barresi, 402 U.S. 39, 91 S. Ct. 1287, 28 L. Ed. 2d 582 (1971).

Wash.—Dawson v. Troxel, 17 Wash. App. 129, 561 P.2d 694 (Div. 1 1977).

6 U.S.—Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 127 S. Ct. 2738, 168 L. Ed. 2d 508, 220 Ed. Law Rep. 84 (2007).

7 U.S.—Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 127 S. Ct. 2738, 168 L. Ed. 2d 508, 220 Ed. Law Rep. 84 (2007).

8 U.S.—Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971).

9 U.S.—Clark v. Board of Ed. of Little Rock School Dist., 426 F.2d 1035 (8th Cir. 1970).

10 U.S.—Dowell v. Board of Ed. of Oklahoma City Public Schools, 396 U.S. 269, 90 S. Ct. 415, 24 L. Ed. 2d 414 (1969).

11 Cal.—San Francisco Unified School Dist. v. Johnson, 3 Cal. 3d 937, 92 Cal. Rptr. 309, 479 P.2d 669 (1971).

Equal protection not violated

(1) The actions of a board of education and school superintendent in drawing attendance boundaries, creating optional attendance zones, and permitting student transfers did not violate the right to equal protection of the laws.

U.S.—Bell v. Board of Ed., Akron Public Schools, 491 F. Supp. 916 (N.D. Ohio 1980), judgment aff'd, 683 F.2d 963 (6th Cir. 1982).

(2) A school board's school attendance rezoning plan did not treat similarly situated students of different races in a different manner, and thus, the plan did not violate the Equal Protection Clause; students in different attendance zones were not subjected to the same alleged academic conditions, and were therefore not similarly situated, and nonwhite and white students within the same zone were provided the same educational opportunities, course options, and quality of instruction.

U.S.—Lewis v. Ascension Parish School Bd., 2014 WL 7272480 (M.D. La. 2014).

12 U.S.—Ellis v. Board of Public Instruction of Orange County, Fla., 423 F.2d 203 (5th Cir. 1970).

13 U.S.—Crawford v. Board of Educ. of City of Los Angeles, 458 U.S. 527, 102 S. Ct. 3211, 73 L. Ed. 2d 948, 5 Ed. Law Rep. 82 (1982); Goss v. Board of Ed., City of Knoxville, Tenn., 320 F. Supp. 549 (E.D. Tenn. 1970).

Equal protection requirements satisfied

(1) A school district's neighborhood school plan which eliminated court-ordered busing was adopted for legitimate, nondiscriminatory reasons and there was no sign of discriminatory intent, and thus, the plan satisfied equal protection requirements.

U.S.—Dowell v. Board of Educ. of Oklahoma City Public Schools, 778 F. Supp. 1144, 71 Ed. Law Rep. 741 (W.D. Okla. 1991), aff'd, 8 F.3d 1501, 87 Ed. Law Rep. 67 (10th Cir. 1993).

(2) A school district's student assignment plan that placed minority students in overcrowded schools with mobile classrooms that were allegedly inferior in educational opportunities or services was not adopted with the purpose of intentionally discriminating against minority students based on their race or ethnicity in violation of the Equal Protection Clause where the district's ultimate decision to adopt the plan was based on a neighborhood school concept that minimized busing and allowed children to attend schools nearer to their homes.

U.S.—McFadden v. Board of Educ. for Illinois School Dist. U-46, 984 F. Supp. 2d 882, 305 Ed. Law Rep. 260 (N.D. Ill. 2013).

14 U.S.—Dowell v. Board of Educ. of Oklahoma City Public Schools, 778 F. Supp. 1144, 71 Ed. Law Rep. 741 (W.D. Okla. 1991), aff'd, 8 F.3d 1501, 87 Ed. Law Rep. 67 (10th Cir. 1993).

15 U.S.—Jefferson v. Board of Ed. of Fayette County, Ky., 344 F. Supp. 688 (E.D. Ky. 1972), aff'd, 486 F.2d 1405 (6th Cir. 1973).

16 U.S.—Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 102 S. Ct. 3187, 73 L. Ed. 2d 896, 5 Ed. Law Rep. 58 (1982).

17 U.S.—Clark v. Board of Ed. of Little Rock School Dist., 426 F.2d 1035 (8th Cir. 1970); Swann v. Charlotte-Mecklenburg Bd. of Ed., 312 F. Supp. 503 (W.D. N.C. 1970), order aff'd, 402 U.S. 43, 91 S. Ct. 1284, 28 L. Ed. 2d 586 (1971).

18

U.S.—Clark v. Board of Ed. of Little Rock School Dist., 426 F.2d 1035 (8th Cir. 1970).

Burden of integration by means of busing

(1) Where a pattern of pupil assignment was implemented by free school bus transportation, a school board's plan in requiring black children in grades one through five to travel as much as five or six miles in order to attend previously all-white schools did not deny equal protection by unfairly allocating the "burden" of integration.

U.S.—Allen v. Asheville City Bd. of Ed., 434 F.2d 902 (4th Cir. 1970).

(2) In the absence of any evidence to show that the burden of busing has been imposed unnecessarily on minority students, the mere fact that the unchallenged closing of heavily minority enrolled schools required a large percentage of minority students to be bused out of their former districts to schools with low minority enrollments did not establish a violation of the Equal Protection Clause.

U.S.—Moss v. Stamford Bd. of Ed., 356 F. Supp. 675 (D. Conn. 1973).

(3) A program that involves one-way busing of black students in a system which has a history of de jure segregation violates equal protection by causing the burden of desegregation to fall disproportionately upon blacks.

U.S.—National Ass'n for Advancement of Colored People v. Lansing Bd. of Ed., 559 F.2d 1042 (6th Cir. 1977); Spangler v. Pasadena City Bd. of Ed., 311 F. Supp. 501 (C.D. Cal. 1970).

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16B C.J.S. Constitutional Law § 1295

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

A. Discrimination by Reason of Race, Color, Ethnicity, or Creed

2. Particular Matters

§ 1295. Discrimination in private schools

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3277, 3280

State action which fosters racial or religious segregation in private schools violates the Equal Protection Clause of the Federal Constitution.

State action or involvement which encourages racial or religious segregation in private educational institutions violates the constitutional guarantee of equal protection.[1] Thus, the use of state funds to support a segregated private school constitutes unconstitutional state action under the Equal Protection Clause.[2] This rule renders unconstitutional statutes which provide for tuition grants to the parents of children who attend racially segregated private schools where the statutes are designed to establish and maintain such schools.[3]

A state program which furnishes textbooks,[4] supplies, and other school aids[5] to private schools without reference to whether such schools maintain racially discriminatory policies is violative of the equal protection guaranty. The equal protection proscription against a state's becoming involved with discrimination in private schools is not limited to state aid that is the motivating force for the withdrawal of white students from the public schools; rather, such aid to segregated schools is restricted by equal protection principles even though the white students' decision to attend such schools is not influenced by the particular aid granted.[6]

A sale of public school property for use as a private school should be scrutinized with the highest degree of care to the end that such property not be used by a school which engages in discriminatory practices,[7] and under certain circumstances, the sale of a public school building to a private school which practices racial segregation may constitute a denial of equal protection.[8] On the other hand, a public school board's policy of refusing to sell surplus school buildings to a private school does not violate the Federal Constitution, since the policy furthers the legitimate governmental interest of implementing desegregation, because if the public schools were to make surplus public school property available to private schools, their enrollment capacity would be increased, thereby arguably enhancing the ability of private schools to drain additional white students from the public school system.[9]

State enforcement of a will.

A state's enforcement of the terms of a will, which include provisions for the creation and maintenance of private schools that are required to have enrollment restrictions based on race, constitutes state action which is violative of the Equal Protection Clause.[10]

CUMULATIVE SUPPLEMENT

Cases:

Louisiana's private school voucher program was outside the scope of the district court's continuing jurisdiction under federal desegregation order that had remedial purpose of preventing future state aid to discriminatory private schools, and thus injunction creating a new and different certification regime for the voucher program was void for lack of subject matter jurisdiction; voucher program's potential impact on desegregation orders for public schools in separate federal desegregation cases was distinct from eliminating public funding for discriminatory private schools, voucher program aid was for students rather than private schools, and, even if the voucher program aided private schools, it was not being given to discriminatory private schools. Fed.Rules Civ.Proc.Rule 60(b)(4), 28 U.S.C.A. Brumfield v. Louisiana State Bd. of Educ., 806 F.3d 289 (5th Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Poindexter v. Louisiana Financial Assistance Commission, 275 F. Supp. 833 (E.D. La. 1967), judgment aff'd, 389 U.S. 571, 88 S. Ct. 693, 19 L. Ed. 2d 780 (1968).
Relevant factors
Standing alone, the supervision which the state exercises over even private schools and the special benefit which it attaches to nonprofit or charitable educational institutions do not involve prohibited state racial discriminatory action per se, but such factors are relevant in ascertaining whether the total state involvement is such as to afford the practice of racial discrimination by a state-subsidized or supervised institution an aura of public approval and sanction.
U.S.—Com. of Pa. v. Brown, 270 F. Supp. 782 (E.D. Pa. 1967), judgment aff'd, 392 F.2d 120, 25 A.L.R.3d 724 (3d Cir. 1968).

2 U.S.—Poindexter v. Louisiana Financial Assistance Commission, 275 F. Supp. 833 (E.D. La. 1967), judgment aff'd, 389 U.S. 571, 88 S. Ct. 693, 19 L. Ed. 2d 780 (1968).
Statutory school-choice program

A civil rights organization challenging the constitutionality of an amended statutory school-choice program failed to sufficiently allege that the State enacted the program with the discriminatory intent necessary to establish a facial equal protection claim, even given allegations that the purposes of the program were expanded to include segregation of the races in the school system; the program was race-neutral on its face.
Wis.—Jackson v. Benson, 218 Wis. 2d 835, 578 N.W.2d 602, 126 Ed. Law Rep. 399 (1998).

3 U.S.—Poindexter v. Louisiana Financial Assistance Commission, 275 F. Supp. 833 (E.D. La. 1967), judgment aff'd, 389 U.S. 571, 88 S. Ct. 693, 19 L. Ed. 2d 780 (1968); Coffey v. State Educational Finance Commission, 296 F. Supp. 1389 (S.D. Miss. 1969); Griffin v. State Bd. of Ed., 296 F. Supp. 1178 (E.D. Va. 1969).

4 U.S.—Norwood v. Harrison, 413 U.S. 455, 93 S. Ct. 2804, 37 L. Ed. 2d 723 (1973).

5 U.S.—Brumfield v. Dodd, 405 F. Supp. 338 (E.D. La. 1975), order supplemented on other grounds, 425 F. Supp. 528 (E.D. La. 1976).

6 U.S.—U.S. v. State of Miss., 499 F.2d 425 (5th Cir. 1974).

7 U.S.—McNeal v. Tate County School Dist., 460 F.2d 568 (5th Cir. 1971).

8 U.S.—Wright v. City of Brighton, Ala., 441 F.2d 447 (5th Cir. 1971).

9 U.S.—Wilmington Christian School, Inc. v. Board of Educ. of Red Clay Consol. School Dist., 545 F. Supp. 440, 6 Ed. Law Rep. 77 (D. Del. 1982).

10 U.S.—Sweet Briar Institute v. Button, 280 F. Supp. 312 (W.D. Va. 1967).

As to discrimination in enforcement of private covenants and restrictions, see § 1297.

Substitution of trustees

Where a will left property to the mayor, aldermen, and citizens of a city in trust for various purposes, including the education of poor male white orphans, and the city trustees administered the trust successfully for over 100 years but after a decision that restriction to whites was unconstitutional, the court substituted individual trustees to carry out the racial exclusion, such substitution was unconstitutional state action.
U.S.—Com. of Pa. v. Brown, 392 F.2d 120, 25 A.L.R.3d 724 (3d Cir. 1968).

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

A. Discrimination by Reason of Race, Color, Ethnicity, or Creed

2. Particular Matters

§ 1296. Discrimination in regard to property rights and housing

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3114, 3256, 3258, 3260(1), 3261, 3264

Official state action which authorizes racial discrimination in matters involving property rights violates the Equal Protection Clause.

Where official state action is intended to authorize, and in effect authorizes, racial discrimination in matters involving property rights, including housing, a state may be held to have significantly involved itself in invidious discrimination in violation of the Equal Protection Clause of the Federal Constitution.[1] Thus, any state action which aids or fosters private racial discrimination in matters involving the sale or rental of real property violates the constitutional guarantee of equal protection,[2] and legislation purporting to prohibit a state from denying to any person the right to decline to sell, lease, or rent his or her property to whomever he or she chooses is an unconstitutional infringement of the Equal Protection Clause of the Fourteenth Amendment.[3]

An unconstitutional involvement may arise from an exercise of zoning powers,[4] a denial of a building permit,[5] maintenance of segregated low-rent housing facilities,[6] resistance by authorities to attempts aimed at achieving a housing policy of balanced and dispersed public housing,[7] or refusal to furnish public utilities to an area.[8] Moreover, the action of a housing authority in

granting or, under certain circumstances, in failing to grant, a preference to particular persons as to occupancy in low-cost public housing may constitute a denial of the equal protection guaranty.[9]

Equal protection is denied when the State, through an urban renewal project, displaces area residents into a housing market where, because of their race, they are deprived of adequate facilities and consequently forced into substandard housing or out of the area entirely.[10] However, while the termination of a project for the construction of low-income housing is a violation of the Equal Protection Clause when such state action is racially motivated,[11] an abandonment of a plan for low-income family housing on a parcel of land while a plan for senior citizens low-income housing thereon is continued does not deny equal protection.[12]

In any event, a legislative classification involving housing and other property rights does not violate the Equal Protection Clause where there is a rational basis for the classification.[13]

CUMULATIVE SUPPLEMENT

Cases:

Female African-American landlord failed to sufficiently allege facts connecting her alleged sexual harassment by city code inspector to alleged wrongful fines and permit denials by other city code officials, and thus landlord failed to state claim for city's municipal liability under § 1983 for equal protection violation based on city officials' alleged punishment of landlord for refusing to have sexual relations with inspector; inspector's alleged harassment of landlord began about eight years before any other official took action against her, which was too large a gap to demonstrate officials' support for inspector's misconduct. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983. Kelly v. City of Omaha, Neb., 813 F.3d 1070 (8th Cir. 2016).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Southern Alameda Spanish Speaking Organization v. City of Union City, 314 F. Supp. 967 (N.D. Cal. 1970), decision aff'd, 424 F.2d 291 (9th Cir. 1970).
Requisite intent not shown
U.S.—City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation, 538 U.S. 188, 123 S. Ct. 1389, 155 L. Ed. 2d 349 (2003); City of Fort Lauderdale v. Scott, 888 F. Supp. 2d 1279 (S.D. Fla. 2012), judgment aff'd, 551 Fed. Appx. 972 (11th Cir. 2014); Yaodi Hu v. Village of Midlothian, 631 F. Supp. 2d 990 (N.D. Ill. 2009); Folger v. City of Minneapolis, 43 F. Supp. 3d 922 (D. Minn. 2014).
Required showing
In the area of housing, in order to find a racially discriminatory effect violative of the Equal Protection Clause, there must be some showing that a policy or activity which has a racially discriminatory effect results from a prior pattern of discrimination or that such policies affect only racial minorities.
U.S.—Citizens Committee for Faraday Wood v. Lindsay, 362 F. Supp. 651 (S.D. N.Y. 1973), judgment aff'd, 507 F.2d 1065 (2d Cir. 1974).

2 Ohio—Allison v. City of Akron, 45 Ohio App. 2d 227, 74 Ohio Op. 2d 343, 343 N.E.2d 128 (9th Dist. Summit County 1974).

3 U.S.—Reitman v. Mulkey, 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967); Otey v. Common Council of City of Milwaukee, 281 F. Supp. 264 (E.D. Wis. 1968).
Cal.—Thomas v. Goulis, 64 Cal. 2d 884, 50 Cal. Rptr. 910, 413 P.2d 854 (1966).

4 U.S.—Kennedy Park Homes Ass'n v. City of Lackawanna, 318 F. Supp. 669 (W.D. N.Y. 1970), judgment aff'd, 436 F.2d 108 (2d Cir. 1970).

Discriminatory intent not shown

U.S.—Hussein v. City of Perrysburg, 647 F. Supp. 2d 838 (N.D. Ohio 2009), rev'd on other grounds, 617 F.3d 828 (6th Cir. 2010).

Parties not similarly situated

U.S—Dahlsten v. Lee, 531 F. Supp. 2d 1029 (N.D. Iowa 2008); Hussein v. City of Perrysburg, 647 F. Supp. 2d 838 (N.D. Ohio 2009), rev'd on other grounds, 617 F.3d 828 (6th Cir. 2010).

Discrimination due to poverty

A zoning ordinance which effectively precluded low-cost housing in a city did not discriminate unlawfully on the basis of race on the theory that a large portion of the poor people in the county in which the city was located were of Mexican descent and that the ordinance therefore discriminated against those of that ancestry since the effect on poor people of Mexican descent was due to poverty and not to ancestry.

U.S.—Ybarra v. Town of Los Altos Hills, 370 F. Supp. 742 (N.D. Cal. 1973), judgment aff'd, 503 F.2d 250 (9th Cir. 1974).

Single act

A consistent pattern of official racial discrimination is not a necessary predicate to a violation of the Equal Protection Clause; a single invidiously discriminatory governmental act, in the exercise of the zoning power as elsewhere, is not necessarily immunized by the absence of such discrimination in making other comparable decisions.

U.S.—Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).

5 U.S.—Crow v. Brown, 457 F.2d 788 (5th Cir. 1972).

6 U.S.—Thomas v. Housing Authority of City of Little Rock, 282 F. Supp. 575 (E.D. Ark. 1967).

7 U.S.—Crow v. Brown, 332 F. Supp. 382 (N.D. Ga. 1971), judgment aff'd, 457 F.2d 788 (5th Cir. 1972).

Frustration of low-income housing construction

U.S.—Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977).

Selection of sites

(1) Black tenants in, or applicants for, public housing had the right under the Fourteenth Amendment to have sites selected for public housing projects without regard to the racial composition of either the surrounding neighborhood or of the projects themselves, and such persons had a right to maintain an action to determine whether their opinion that such a right was being denied them was correct and to secure an appropriate remedy to insure protection of their right.

U.S.—Gautreaux v. Chicago Housing Authority, 265 F. Supp. 582 (N.D. Ill. 1967).

(2) Where the dominant factor in selecting sites for the location of public housing was the racial concentration of the neighborhoods, and the purpose was to perpetuate segregation of the races in public housing, and where the present location of sites in all-black neighborhoods would most likely perpetuate segregation, this was rank discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment.

U.S.—Hicks v. Weaver, 302 F. Supp. 619 (E.D. La. 1969).

Racial animus not shown

Actions of a city, in submitting to voters, pursuant to the requirements of its charter, a facially neutral referendum petition calling for the repeal of a municipal housing ordinance authorizing construction of a low-income housing complex, did not reflect the intent required to support equal protection liability; by placing the referendum on the ballot, the city did not enact the referendum, and so could not be said to have given effect to the voters' allegedly discriminatory motives for supporting the petition, and there was no evidence that the city's official acts were themselves motivated by racial animus.

U.S.—City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation, 538 U.S. 188, 123 S. Ct. 1389, 155 L. Ed. 2d 349 (2003).

8 U.S.—United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, Florida, 493 F.2d 799 (5th Cir. 1974).

9 U.S.—Otero v. New York City Housing Authority, 344 F. Supp. 737 (S.D. N.Y. 1972).

10 U.S.—Feliciano v. Romney, 363 F. Supp. 656 (S.D. N.Y. 1973).

11 U.S.—Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977).

12 U.S.—Acevedo v. Nassau County, New York, 500 F.2d 1078 (2d Cir. 1974).

13 Md.—Montgomery County v. Fields Road Corp., 282 Md. 575, 386 A.2d 344 (1978).

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16B C.J.S. Constitutional Law § 1297

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

A. Discrimination by Reason of Race, Color, Ethnicity, or Creed

2. Particular Matters

§ 1297. Equal protection; private covenants and restrictions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3259

Racially restrictive covenants violate the constitutional guarantee of equal protection.

Racially restrictive covenants violate the Equal Protection Clause of the Federal Constitution.[1] Thus, it is a violation of equal protection for a state court to enforce a private agreement which excludes persons of a specified race or color from using or occupying real estate for residential purposes.[2]

Similarly, the Fourteenth Amendment bars state enforcement of a provision in a will establishing and maintaining an orphanage for white children only[3] as well as enforcement of a restrictive agreement which excludes the burial of non-Caucasians in a certain cemetery.[4]

CUMULATIVE SUPPLEMENT

Cases:

Until some state law has been passed or some state action through its officers or agents has been taken adverse to the rights of citizens sought to be protected by the Fourteenth Amendment to the United States Constitution, U.S.C.A., no legislation of the United States under such amendment, nor any proceedings under such legislation, can be called into activity, for the prohibitions of the amendment are against state laws and acts done under state authority. Civil Rights Cases, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835 (1883).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Dowell v. Board of Ed. of Oklahoma City Public Schools, 338 F. Supp. 1256 (W.D. Okla. 1972), aff'd, 465 F.2d 1012 (10th Cir. 1972); Bradley v. School Bd. of City of Richmond, Va., 317 F. Supp. 555 (E.D. Va. 1970).

2 Ga.—Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160 (1968), judgment aff'd, 396 U.S. 435, 90 S. Ct. 628, 24 L. Ed. 2d 634 (1970).

3 U.S.—U.S. v. Hughes Memorial Home, 396 F. Supp. 544 (W.D. Va. 1975).
Fostering of discrimination under private trust
Any state action which fosters racial discrimination under the provisions of a private trust is invalid.
U.S.—Com. of Pa. v. Board of Directors of City Trusts of City of Philadelphia, 353 U.S. 230, 77 S. Ct. 806, 1 L. Ed. 2d 792 (1957).
Del.—Milford Trust Co. v. Stabler, 301 A.2d 534 (Del. Ch. 1973).

4 Mich.—Spencer v. Flint Memorial Park Ass'n, 4 Mich. App. 157, 144 N.W.2d 622 (1966).

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

B. Gender-Based Discrimination

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Research References

A.L.R. Library

A.L.R. Index, Equal Protection
A.L.R. Index, Sex Discrimination
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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

B. Gender-Based Discrimination

1. In General

§ 1298. Gender-based discrimination as denial of equal protection

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3380

In the absence of some valid reason to the contrary, men and women similarly situated must be treated equally under the law, but the Equal Protection Clause does not require equal treatment for men and women under all circumstances.

The Equal Protection Clauses of the federal and state constitutions apply to all persons regardless of their sex,[1] and thus, one has a constitutional right to be free from discrimination on the basis of sex.[2] Sex discrimination against men or women is a violation of the Equal Protection Clause of the Fourteenth Amendment.[3] To make out a claim of gender discrimination under the Equal Protection Clause, the plaintiff ordinarily must prove that he or she suffered purposeful or intentional discrimination on the basis of gender.[4] A plaintiff need not show that the challenged action rested solely on discriminatory purposes but only that the discriminatory purpose was a motivating factor.[5]

As a general rule, sex-based discrimination which is unsupported by reasonable justifications violates the Equal Protection Clause.[6] State-sponsored gender discrimination violates equal protection unless it serves important governmental objectives and the discriminatory means employed are substantially related to the achievement of those objectives.[7] Thus, in the absence

of some valid reason to the contrary, men and women similarly situated must be treated equally under the law.[8] A legislature may not make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class.[9]

On the other hand, the Equal Protection Clause does not require equal treatment for men and women under all circumstances.[10] The constitutional guaranty does not ordinarily prevent the State from making a classification dependent upon one's sex[11] where men and women are not similarly situated[12] and the gender classification is not invidious.[13]

Moreover, in limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.[14] A legislature may provide for the special problems of women without offending the Equal Protection Clause.[15] However, the mere recitation of a benign, compensatory purpose for a statutory classification by gender is not an automatic shield that protects against any inquiry into the actual purposes underlying the statutory scheme.[16]

Burden of proof.

The party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an exceedingly persuasive justification for the classification.[17] The burden of justification for an official classification based on gender, under an equal protection analysis, is demanding and it rests entirely on the state.[18]

State involvement in private action.

If private persons engage in purely private acts of discrimination against women, they do not violate the Equal Protection Clause.[19] However, when the state has so far insinuated itself into a position of interdependence with a state-aided institution that it must be recognized as a joint participant in alleged sexual discrimination, there is state action within the meaning of the Equal Protection Clause.[20]

Facially neutral legislation.

When a statute which is gender-neutral on its face is challenged on the ground that its effects upon women are disproportionately adverse, a two-fold inquiry is appropriate.[21] The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based.[22] If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination.[23] In this second inquiry, the impact of the classification provides an important starting point, but purposeful discrimination is the condition that offends the constitutional guarantee of equal protection.[24]

CUMULATIVE SUPPLEMENT

Cases:

Under equal protection principles, the Supreme Court views with suspicion laws that rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. U.S.C.A. Const.Amend. 5. Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).

Under equal protection principles, if a statutory objective is to exclude or protect members of one gender in reliance on fixed notions concerning that gender's roles and abilities, the objective itself is illegitimate. U.S.C.A. Const.Amend. 5. Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).

Even if stereotypes frozen into legislation have statistical support, measures that classify unnecessarily and overbroadly by gender are rejected, under equal protection principles, when more accurate and impartial lines can be drawn. U.S.C.A. Const.Amend. 5. Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).

[END OF SUPPLEMENT]

Footnotes

1 Conn.—Kellems v. Brown, 163 Conn. 478, 313 A.2d 53 (1972).
Pa.—Com. v. Daniel, 430 Pa. 642, 243 A.2d 400 (1968).

2 U.S.—Wallace v. City of New Orleans, 654 F.2d 1042 (5th Cir. 1981); Curran v. Portland Superintending School Committee, City of Portland, Me., 435 F. Supp. 1063, 46 A.L.R. Fed. 304 (D. Me. 1977).1
A.L.R. Library
Equal Protection and Due Process Clause Challenges Based on Sex Discrimination—Supreme Court Cases, 178 A.L.R. Fed. 25.
What Constitutes Reverse Sex or Gender Discrimination Against Males Violative of Federal Constitution or Statutes—Nonemployment Cases, 166 A.L.R. Fed. 1.

3 N.D.—City of Mandan v. Fern, 501 N.W.2d 739 (N.D. 1993).
Presumption discriminating against men rather than women
The fact that a presumption discriminates against men rather than women does not protect it from judicial scrutiny.
Ala.—Ex parte Devine, 398 So. 2d 686 (Ala. 1981).

4 U.S.—Back v. Hastings On Hudson Union Free School Dist., 365 F.3d 107, 187 Ed. Law Rep. 13 (2d Cir. 2004); Dutko v. Lofthouse, 549 F. Supp. 2d 187 (D. Conn. 2008); Roberts v. U.S., 883 F. Supp. 2d 56 (D.D.C. 2012), judgment aff'd, 741 F.3d 152 (D.C. Cir. 2014), cert. denied, 135 S. Ct. 181, 190 L. Ed. 2d 129 (2014).
Gender ratios
Mere reliance on gender ratios of two groups to show disparate impact does not establish discrimination based on sex in violation of the Equal Protection Clause.
U.S.—Totes-Isotoner Corp. v. U.S., 594 F.3d 1346 (Fed. Cir. 2010).

5 U.S.—Roberts v. U.S., 883 F. Supp. 2d 56 (D.D.C. 2012), judgment aff'd, 741 F.3d 152 (D.C. Cir. 2014), cert. denied, 135 S. Ct. 181, 190 L. Ed. 2d 129 (2014).
Intent analyzed essentially the same way as in Title VII cases
U.S.—Hill v. City of Pine Bluff, Ark., 696 F.3d 709 (8th Cir. 2012).

6 U.S.—Lyon v. Temple University of Commonwealth System of Higher Educ., 543 F. Supp. 1372 (E.D. Pa. 1982).
As to judicial scrutiny of gender-based discrimination, see § 1299.
Administrative convenience not valid basis
U.S.—Califano v. Goldfarb, 430 U.S. 199, 97 S. Ct. 1021, 51 L. Ed. 2d 270 (1977).

7 § 1299.

8 U.S.—Hobson v. Pow, 434 F. Supp. 362 (N.D. Ala. 1977).
Cal.—Woods v. Horton, 167 Cal. App. 4th 658, 84 Cal. Rptr. 3d 332 (3d Dist. 2008).
Conn.—Kellems v. Brown, 163 Conn. 478, 313 A.2d 53 (1972).
N.Y.—State ex rel. Watts v. Watts, 77 Misc. 2d 178, 350 N.Y.S.2d 285 (Fam. Ct. 1973).

9 U.S.—Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 101 S. Ct. 1200, 67 L. Ed. 2d 437 (1981).
Classifications based on stereotyped assumptions
U.S.—White v. Fleming, 522 F.2d 730 (7th Cir. 1975).

Legal, social, and economic inferiority of women

Under equal protection principles, gender classifications may never be used to create or perpetuate a legal, social, and economic inferiority of women.

U.S.—U.S. v. Virginia, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996); Roubideaux v. North Dakota Dept. of Corrections and Rehabilitation, 570 F.3d 966, 246 Ed. Law Rep. 649 (8th Cir. 2009).

Statutes based on old notions

Statutes that distinguish between males and females based on old notions, such as the belief that females should be afforded special protection from "rough talk" because of their perceived special sensitivities, can no longer withstand equal protection scrutiny.

S.C.—In Interest of Joseph T., 312 S.C. 15, 430 S.E.2d 523 (1993).

Misconceptions concerning role of females

A statute which is based on the legislature's misconceptions concerning the role of females in the home rather than in the market place and the world of ideas will not survive constitutional scrutiny.

U.S.—Orr v. Orr, 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979).

Ala.—Hall v. McBride, 416 So. 2d 986 (Ala. 1982).

10 Pa.—Wells v. Civil Service Commission, 423 Pa. 602, 225 A.2d 554 (1967).

11 U.S.—Vorchheimer v. School Dist. of Philadelphia, 532 F.2d 880 (3d Cir. 1976), judgment aff'd, 430 U.S. 703, 97 S. Ct. 1671, 51 L. Ed. 2d 750 (1977); Reach Academy for Boys and Girls, Inc. v. Delaware Department of Education, 46 F. Supp. 3d 455, 314 Ed. Law Rep. 693 (D. Del. 2014).

Utah—Redwood Gym v. Salt Lake County Commission, 624 P.2d 1138 (Utah 1981).

Wyo.—A v. X, Y, and Z, 641 P.2d 1222 (Wyo. 1982).

Unique presence of physical characteristic

A classification based on a physical characteristic unique to one sex is not impermissive under- or over-inclusive classification because the differentiation is based on the unique presence of a physical characteristic in one sex and not based on averaging of trait or characteristic which exists in both sexes.

Haw.—State v. Rivera, 62 Haw. 120, 612 P.2d 526 (1980).

12 U.S.—Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 101 S. Ct. 1200, 67 L. Ed. 2d 437 (1981); Lafler v. Athletic Bd. of Control, 536 F. Supp. 104 (W.D. Mich. 1982).

Idaho—State v. Greensweig, 103 Idaho 50, 644 P.2d 372 (Ct. App. 1982).

Statute realistically reflecting lack of similar situation

A statute will be upheld on equal protection grounds where a gender classification realistically reflects the fact that the sexes are not similarly situated in certain circumstances.

S.C.—In Interest of Joseph T., 312 S.C. 15, 430 S.E.2d 523 (1993).

13 U.S.—Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 101 S. Ct. 1200, 67 L. Ed. 2d 437 (1981).

14 U.S.—Mississippi University for Women v. Hogan, 458 U.S. 718, 102 S. Ct. 3331, 73 L. Ed. 2d 1090, 5 Ed. Law Rep. 103 (1982).

Economic disabilities

Sex classifications may be used to compensate women for particular economic disabilities they have suffered, to promote equal employment opportunity, or to advance the full development of the talent and capacities of the nation's people.

U.S.—U.S. v. Virginia, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996); Reach Academy for Boys and Girls, Inc. v. Delaware Department of Education, 46 F. Supp. 3d 455, 314 Ed. Law Rep. 693 (D. Del. 2014).

A.L.R. Library

Validity, construction, and application of state enactment, order, or regulation expressly prohibiting sexual orientation discrimination, 82 A.L.R.5th 1.

15 U.S.—Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 101 S. Ct. 1200, 67 L. Ed. 2d 437 (1981).

16 U.S.—Mississippi University for Women v. Hogan, 458 U.S. 718, 102 S. Ct. 3331, 73 L. Ed. 2d 1090, 5 Ed. Law Rep. 103 (1982).

17 U.S.—Mississippi University for Women v. Hogan, 458 U.S. 718, 102 S. Ct. 3331, 73 L. Ed. 2d 1090, 5 Ed. Law Rep. 103 (1982).

18 U.S.—U.S. v. Virginia, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996).

19 U.S.—Whitten v. Petroleum Club of Lafayette, 508 F. Supp. 765 (W.D. La. 1981).

20 U.S.—Rackin v. University of Pennsylvania, 386 F. Supp. 992 (E.D. Pa. 1974).

21 U.S.—Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979); Frock v. U.S. R. R. Retirement Bd., 685 F.2d 1041 (7th Cir. 1982).

22 U.S.—Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979); Frock v. U.S. R. R. Retirement Bd., 685 F.2d 1041 (7th Cir. 1982).

23 U.S.—Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979); Frock v. U.S. R. R. Retirement Bd., 685 F.2d 1041 (7th Cir. 1982).

Intermediate scrutiny

When a law is challenged for an equal protection violation based on gender, it must normally be subject to "intermediate scrutiny," involving a determination of whether the statutory classification is neutral in the sense that it is not gender based, and if not based upon gender, whether adverse effects of the law reflect invidious gender-based discrimination.

U.S.—Tucson Woman's Clinic v. Eden, 379 F.3d 531 (9th Cir. 2004).

As to intermediate scrutiny of gender-based discrimination, see § 1299.

24 U.S.—Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979); Frock v. U.S. R. R. Retirement Bd., 685 F.2d 1041 (7th Cir. 1982).

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16B C.J.S. Constitutional Law § 1299

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Constitutional Law
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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

B. Gender-Based Discrimination

1. In General

§ 1299. Judicial scrutiny of gender-based discrimination

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3081

Classifications by gender generally are subject to a heightened standard of review, under which such classifications must serve important governmental objectives and must be substantially related to the achievement of those objectives.

Sex-based classifications are subject to scrutiny by the courts under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[1] Legislative classifications based on gender call for a heightened standard of review[2] and will fail when challenged as denying equal protection unless substantially related to a sufficiently important governmental interest.[3] That is, state-sponsored gender discrimination violates equal protection unless it serves important governmental objectives and the discriminatory means employed are substantially related to the achievement of those objectives.[4] Stated another way, a sovereign may not subject men and women to disparate treatment where there is no substantial relationship between the classification and an important governmental purpose.[5]

Intermediate or strict scrutiny.

Gender, unlike race or alienage, ordinarily is not considered a suspect class that is subject to strict scrutiny.[6] Rather, discriminatory classifications based on sex are generally subject to an intermediate scrutiny for equal protection,[7] under which standard the statute will be upheld only if it is substantially related to an important state interest.[8] However, in some jurisdictions, classifications based on gender are subject to a strict scrutiny analysis,[9] under which the government must show a compelling state interest in order for its action to be valid.[10]

CUMULATIVE SUPPLEMENT

Cases:

Statutes, from an era when the lawbooks were rife with overbroad generalizations about the way men and women are, are subject to review in an equal protection challenge under the heightened scrutiny that now attends all gender-based classifications. U.S.C.A. Const.Amend. 5. Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).

Laws granting or denying benefits on the basis of the sex of the qualifying parent differentiate on the basis of gender, and therefore attract heightened review under the Constitution's equal protection guarantee. U.S.C.A. Const.Amend. 5. Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).

Successful defense, against an equal protection challenge, of legislation that differentiates on the basis of gender requires an exceedingly persuasive justification. U.S.C.A. Const.Amend. 5. Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).

The defender, against an equal protection challenge, of legislation that differentiates on the basis of gender must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. U.S.C.A. Const.Amend. 5. Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).

A classification based on gender must substantially serve an important governmental interest today, for in interpreting the equal protection guarantee, the Supreme Court recognizes that new insights and societal understandings can reveal unjustified inequality that once passed unnoticed and unchallenged. U.S.C.A. Const.Amend. 5. Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).

With respect to equal protection challenges, distinctions based on parents' marital status are subject to the same heightened scrutiny as distinctions based on gender. U.S.C.A. Const.Amend. 5. Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).

Intermediate, heightened scrutiny applies under Fifth Amendment's equal protection component to laws that discriminate on basis of gender. U.S.C.A. Const.Amend. 5. Morales-Santana v. Lynch, 804 F.3d 520 (2d Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—White v. Fleming, 522 F.2d 730 (7th Cir. 1975); Zentgraf v. Texas A & M University, 492 F. Supp. 265 (S.D. Tex. 1980).
R.I.—State v. Ware, 418 A.2d 1 (R.I. 1980).

2 U.S.—U.S. v. Virginia, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996); City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).

Mo.—In re Marriage of Woodson, 92 S.W.3d 780 (Mo. 2003).
Okla.—Anderson v. Eichner, 1994 OK 136, 890 P.2d 1329, 98 Ed. Law Rep. 453 (Okla. 1994).
Presumption of constitutional invalidity
Ga.—Rainey v. Chever, 270 Ga. 519, 510 S.E.2d 823 (1999).
3 U.S.—City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).
Benign justifications not to be accepted automatically
U.S.—U.S. v. Virginia, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996).
4 U.S.—U.S. v. Morrison, 529 U.S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658, 144 Ed. Law Rep. 28 (2000).
La.—Matter of Estate of Musso, 932 P.2d 853 (Colo. App. 1997).
5 Cal.—Michelle W. v. Ronald W., 39 Cal. 3d 354, 216 Cal. Rptr. 748, 703 P.2d 88 (1985).
N.C.—Department of Transp. v. Rowe, 353 N.C. 671, 549 S.E.2d 203 (2001).
N.D.—City of Mandan v. Fern, 501 N.W.2d 739 (N.D. 1993).
Substantial furtherance of appropriate state purpose
La.—State v. Expunged Record (No.) 249,044, 881 So. 2d 104 (La. 2004), as clarified on reh'g, (Sept. 24, 2004).
6 U.S.—Lafler v. Athletic Bd. of Control, 536 F. Supp. 104 (W.D. Mich. 1982).
Mass.—Com. v. Chou, 433 Mass. 229, 741 N.E.2d 17 (2001).
As to strict scrutiny of discrimination based on suspect classifications like race, ethnicity, or creed, generally, see § 1282.
7 U.S.—Pierre v. Holder, 738 F.3d 39 (2d Cir. 2013), petition for certiorari filed, 135 S. Ct. 58, 190 L. Ed. 2d 32 (2014); H.B. Rowe Co., Inc. v. Tippett, 615 F.3d 233 (4th Cir. 2010); Norsworthy v. Beard, 2014 WL 6842935 (N.D. Cal. 2014); Konah v. District of Columbia, 915 F. Supp. 2d 7 (D.D.C. 2013).
Idaho—State v. Joslin, 145 Idaho 75, 175 P.3d 764 (2007).
Ill.—People v. Botruff, 212 Ill. 2d 166, 288 Ill. Dec. 105, 817 N.E.2d 463 (2004).
Mass.—Com. v. Chou, 433 Mass. 229, 741 N.E.2d 17 (2001).
Minn.—In re Custody of J.J.S., 707 N.W.2d 706 (Minn. Ct. App. 2006).
N.C.—Department of Transp. v. Rowe, 353 N.C. 671, 549 S.E.2d 203 (2001).
N.D.—City of Mandan v. Fern, 501 N.W.2d 739 (N.D. 1993).
R.I.—Kleczek v. Rhode Island Interscholastic League, Inc., 612 A.2d 734, 77 Ed. Law Rep. 349 (R.I. 1992).
Utah—In re Adoption of J.S., 2014 UT 51, 2014 WL 5573353 (Utah 2014).
8 Iowa—Sanchez v. State, 692 N.W.2d 812, 16 A.L.R.6th 825 (Iowa 2005).
W. Va.—Appalachian Power Co. v. State Tax Dept. of West Virginia, 195 W. Va. 573, 466 S.E.2d 424 (1995).
As to the intermediate scrutiny test, generally, see § 1278.
Substantial relationship to legitimate state interest required
Ky.—D.F. v. Codell, 127 S.W.3d 571, 185 Ed. Law Rep. 1083 (Ky. 2003).
S.C.—In Interest of Joseph T., 312 S.C. 15, 430 S.E.2d 523 (1993).
9 Cal.—Woods v. Horton, 167 Cal. App. 4th 658, 84 Cal. Rptr. 3d 332 (3d Dist. 2008).
Under state Declaration of Rights provision
Md.—Blue v. Arrington, 221 Md. App. 308, 108 A.3d 602 (2015).
Under state equal rights amendment
N.H.—LeClair v. LeClair, 137 N.H. 213, 624 A.2d 1350, 82 Ed. Law Rep. 1120 (1993).
10 N.H.—LeClair v. LeClair, 137 N.H. 213, 624 A.2d 1350, 82 Ed. Law Rep. 1120 (1993).
Under state constitution
(1) Under the strict scrutiny standard of review applied in a gender-based equal protection challenge to statute under the state constitution, a statute is not entitled to presumption of constitutionality; rather, a statute may be upheld only if the means employed by the legislature to achieve the stated goal were necessary to advance a compelling state interest.
Ill.—Estate of Hicks, 174 Ill. 2d 433, 221 Ill. Dec. 182, 675 N.E.2d 89 (1996).
(2) Gender-based classifications, challenged as denying the right to equal protection guaranteed by the state constitution, are to be regarded as suspect and accorded the strictest possible judicial scrutiny and are to be sustained only if the State can demonstrate a compelling interest to justify the classification.
W. Va.—Flack v. Sizer, 174 W. Va. 79, 322 S.E.2d 850 (1984).

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16B C.J.S. Constitutional Law § 1300

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Constitutional Law
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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

B. Gender-Based Discrimination

2. General Principles as Applied to Particular Matters

§ 1300. Equal protection in criminal proceedings

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3417, 3418

A criminal statute violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution where a gender-based classification contained therein does not serve important governmental objectives and is not substantially related to the achievement of those objectives, and a statute proscribing particular sexual activities may be unconstitutional as a denial of equal protection of the law to males where it does not apply to females as well.

A criminal statute violates the Equal Protection Clause where a gender-based classification contained therein does not serve important governmental objectives and is not substantially related to the achievement of those objectives.[1] However, a gender-based classification established by a criminal statute which bears a substantial relationship to an important governmental objective is not unconstitutional as a denial of equal protection.[2]

Legislation proscribing particular sexual activities by males with females,[3] such as a forcible rape statute,[4] or a felony murder statute involving rape,[5] does not unconstitutionally discriminate on the basis of sex because only males are subject to criminal liability. Similarly, a statutory provision making it an offense to have carnal knowledge of a female under a specified age generally does not unlawfully discriminate on the basis of gender because men alone can be held criminally liable thereunder.[6]

The justification for such discrimination lies in the fact that the sex-based classification serves the important governmental objectives of protecting young females from pregnancy and physical and psychological injury resulting from sexual intercourse and is substantially related to the achievement of those objectives.[7] Moreover, there is a compelling and demonstrable state interest in minimizing both the number of illegitimate teenage pregnancies and their disastrous consequences which justifies the classification.[8] On the other hand, a statute proscribing particular sexual activities may be unconstitutional as a denial of equal protection of the law to males where it does not apply to females as well.[9]

Statutes requiring that male criminal defendants of a specified age be prosecuted and sentenced as adults, whereas female defendants of like age are accorded the advantages of juvenile proceedings results in an unconstitutional denial of equal protection of the law.[10]

Nonsupport.

A criminal nonsupport statute which applies equally to males and females is not violative of equal protection,[11] but such a statute which applies only to husbands and fathers violates the constitutional guaranty.[12]

Selective enforcement.

The selective enforcement of a criminal law against a particular class of individuals on the basis of sex is offensive to the Equal Protection Clause.[13]

CUMULATIVE SUPPLEMENT

Cases:

An equal protection challenge to city ordinance prohibiting nudity in a public place, specifically the portion of ordinance prohibiting the showing of the female breast with less than a fully opaque covering of any part of the nipple in a public place, was a facial challenge, and therefore the challengers were required to demonstrate that there was no set of circumstances under which this ordinance might be valid, where the challengers argued that the ordinance made a gender-based classification on its face. N.H. Const. pt. 1, art. 2. State v. Lilley, 204 A.3d 198 (N.H. 2019).

[END OF SUPPLEMENT]

Footnotes

1 Ala.—Frolik v. State, 392 So. 2d 846 (Ala. 1981).
Message to woman or girl
A statute that criminalizes an obscene, profane, indecent, vulgar, suggestive, or immoral message to a woman or girl violates the Equal Protection Clause of the Fourteenth Amendment.
S.C.—In Interest of Joseph T., 312 S.C. 15, 430 S.E.2d 523 (1993).

2 Tex.—Carpenter v. State, 639 S.W.2d 311 (Tex. Crim. App. 1982).
Public nudity statute
Ind.—C.T. v. State, 939 N.E.2d 626 (Ind. Ct. App. 2010).
Prostitution statute applicable only to women
Ind.—Sumpter v. State, 261 Ind. 471, 306 N.E.2d 95 (1974).
Public indecency ordinance

A defendant's prosecution for violation of a public indecency ordinance, based on an act of sexual intercourse in a parked vehicle, did not violate equal protection even though the male defendant's female sexual partner was not likewise prosecuted; a reasonable person could conclude the defendant was charged with the offense for reasons other than his gender, including the fact that the defendant was the only person whose naked buttocks were visible in graphic motion.

Ill.—City of Champaign v. Sides, 349 Ill. App. 3d 293, 284 Ill. Dec. 634, 810 N.E.2d 287 (4th Dist. 2004).

Burden of showing justification for classification

To meet the burden of showing that gender-based law is substantially related to an important governmental objective, the government must set forth an exceedingly persuasive justification for a classification which requires, among other things, a showing that a gender-based law serves the governmental objective better than would a gender-neutral law.

N.Y.—People v. M.K.R., 166 Misc. 2d 456, 632 N.Y.S.2d 382 (J. Ct. 1995).

3 Colo.—People v. Barger, 191 Colo. 152, 550 P.2d 1281 (1976).

Federal Mann Act

The Mann Act does not constitute a denial of equal protection because it makes it unlawful to transport only females, and not males, across state lines.

U.S.—U.S. v. Green, 554 F.2d 372 (9th Cir. 1977).

4 Ala.—Hepstall v. State, 418 So. 2d 223 (Ala. Crim. App. 1982).

Haw.—State v. Rivera, 62 Haw. 120, 612 P.2d 526 (1980).

Nev.—Constancio v. State, 98 Nev. 22, 639 P.2d 547 (1982).

Tex.—Carpenter v. State, 639 S.W.2d 311 (Tex. Crim. App. 1982).

Forcible rape statute unconstitutional

The New York forcible rape statute violates the Equal Protection Clause because it is not gender-neutral.

N.Y.—People v. Liberta, 64 N.Y.2d 152, 485 N.Y.S.2d 207, 474 N.E.2d 567 (1984).

5 Mich.—People v. McDonald, 409 Mich. 110, 293 N.W.2d 588 (1980).

6 U.S.—Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 101 S. Ct. 1200, 67 L. Ed. 2d 437 (1981).

Del.—Acosta v. State, 417 A.2d 373 (Del. 1980).

Idaho—State v. Joslin, 145 Idaho 75, 175 P.3d 764 (2007).

Tex.—Kruger v. State, 623 S.W.2d 386 (Tex. Crim. App. 1981).

Statutory rape provision

A statutory rape provision was not invalid as depriving juvenile males of equal protection of the law, even though the statute only applied to a male engaging in sexual intercourse with an underage female where a female "child" under the age of 17 who engaged in sexual intercourse with a male who was under the age of 14 was subject, under a child-molestation statute, to the same delinquency adjudication as a male "child" who is adjudged to be delinquent by reason of his commission of statutory rape.

Ga.—In Interest of B.L.S., 264 Ga. 643, 449 S.E.2d 823 (1994).

7 U.S.—Rundlett v. Oliver, 607 F.2d 495 (1st Cir. 1979).

N.Y.—People v. Whidden, 51 N.Y.2d 457, 434 N.Y.S.2d 936, 415 N.E.2d 927 (1980).

R.I.—State v. Ware, 418 A.2d 1 (R.I. 1980).

Offense of carnal knowledge

Application of the statutory offense of carnal knowledge of a juvenile to penalize only males for the act of consensual sexual intercourse did not violate the Equal Protection Clause since the gender classification served important governmental objectives in protecting young girls from pregnancy, possible injury to their reproductive systems, and the possibility of lingering mental impairment.

La.—State v. Miller, 663 So. 2d 107 (La. Ct. App. 3d Cir. 1995).

8 Ariz.—State v. Gray, 122 Ariz. 445, 595 P.2d 990 (1979).

Cal.—Michael M. v. Superior Court, 25 Cal. 3d 608, 159 Cal. Rptr. 340, 601 P.2d 572 (1979), judgment aff'd, 450 U.S. 464, 101 S. Ct. 1200, 67 L. Ed. 2d 437 (1981).

9 Fla.—Purvis v. State, 377 So. 2d 674 (Fla. 1979) (fornication).

Fondling

Miss.—Harrell v. State, 386 So. 2d 390 (Miss. 1980); Tatro v. State, 372 So. 2d 283 (Miss. 1979).

Prostitution ordinance

An ordinance proscribing agreeing to engage in prostitution should apply equally to men as well as women.

Wash.—City of Yakima v. Esqueda, 26 Wash. App. 347, 612 P.2d 821 (Div. 3 1980).

Sexual misconduct statute

A sexual misconduct statute impermissibly discriminates on the basis of sex in violation of equal protection, as it provides that only males can commit that offense, and insofar as nonforcible sexual intercourse is concerned, the State failed to present any reason why deterring only males will further the prevention of pregnancy better than imposing a deterrent sanction upon both participants.

N.Y.—People v. M.K.R., 166 Misc. 2d 456, 632 N.Y.S.2d 382 (J. Ct. 1995).

10 U.S.—Radcliff v. Anderson, 509 F.2d 1093 (10th Cir. 1974).

Ill.—People v. Ellis, 57 Ill. 2d 127, 311 N.E.2d 98 (1974).

Tex.—Casas v. State, 626 S.W.2d 805 (Tex. App. San Antonio 1981).

11 Mich.—People v. Gilliam, 108 Mich. App. 695, 310 N.W.2d 843 (1981).

Statutory construction of "he"

A statute providing that a person is guilty of a misdemeanor if he, being a parent, wilfully neglects to support a child born out of lawful wedlock did not violate the Fourteenth Amendment of the United States Constitution where a statutory construction act provided that the word "he" should refer to women as well as men.

Pa.—Com. v. Vagnoni, 272 Pa. Super. 396, 416 A.2d 99 (1979).

12 Mich.—People v. Lewis, 107 Mich. App. 277, 309 N.W.2d 234 (1981).

13 Cal.—People v. Superior Court (Hartway), 19 Cal. 3d 338, 138 Cal. Rptr. 66, 562 P.2d 1315 (1977).

Or.—State v. Goddard, 5 Or. App. 454, 485 P.2d 650 (1971).

Violation not shown

A defendant failed to establish an equal protection claim that his arrest and prosecution for simple assault were due to his gender, as he did not show that those actions were motivated, at least in part, by his gender, and he did not make a prima facie showing that others similarly situated, that is, women who committed crimes of domestic violence, were generally not arrested and prosecuted.

D.C.—Robinson v. U.S., 769 A.2d 747 (D.C. 2001).

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PART VI. Privileges and Immunities; Equal Protection

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2. General Principles as Applied to Particular Matters

§ 1301. Equal protection in criminal proceedings—Sentence and punishment

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3419, 3420

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution is violated when different punishment for offenses is grounded merely on the basis of gender, but the legislature may provide for differing punishments for males and females where the statutory classification serves an important governmental objective and is substantially related to the achievement of such objective.

Disparate sentencing treatment based on sex falls in the category of special treatment given a selected class which impinges seriously on fundamental personal interests,[1] and equal protection is violated when different punishment for offenses is grounded merely on the basis of gender.[2] Thus, statutory provisions for the sentencing of a female offender to an indeterminate term are unconstitutional in a situation where a male offender convicted of the same offense would be sentenced for a minimum-maximum term.[3] Similarly, a sentencing court's general policy of imposing a two-day minimum jail term for assault where the defendant is a male and the victim is a female constitutes a violation of the Equal Protection Clause.[4]

On the other hand, gender disproportion with respect to imposition of the death penalty, without more, is not sufficient to violate equal protection.[5] The fact that a male defendant is charged with capital murder and exposed to a death sentence, while women

who were also allegedly involved in the crime receive plea bargains involving a lesser charge and less severe punishment, does not show gender discrimination in violation of equal protection, where the differences in charging and punishment show that the prosecutor has weighed each individual's culpability as well as State's ability to prove each case in making the decision about whom to prosecute and for what.[6]

Treatment of prisoners.

Under the Equal Protection Clause, any gender-based disparities must be substantially related to the achievement of an important governmental objective.[7] The Equal Protection Clause requires parity of treatment for female prisoners.[8] The proper test is whether the challenged official actions are the result of an intent to invidiously discriminate.[9] It has been said that the application of different grooming regulations to male and female inmates does not implicate equal protection concerns,[10] and differing hair-length rules for men and women have been upheld on the basis that they are justified on the basis of differences in security risks between male and female inmates.[11] Moreover, male and female prison inmates are not similarly situated for purposes of a male prison inmate's equal protection comparison of male inmates, who are subject to "supermax" detention placement, and female inmates, who are not.[12]

The fact that female pretrial detainees have menstrual cycles does not provide a justification, under the Equal Protection Clause, of a county jail's policy of searching new male detainees in large groups while searching female detainees in private since male inmates also present hygiene issues that warrant privacy.[13]

Footnotes

1 U.S.—State v. Costello, 59 N.J. 334, 282 A.2d 748 (1971).

2 U.S.—Hobson v. Pow, 434 F. Supp. 362 (N.D. Ala. 1977).
Conn.—Liberti v. York, 28 Conn. Supp. 9, 246 A.2d 106 (Super. Ct. 1968).
Discriminatory purpose required
U.S.—Spreitz v. Ryan, 617 F. Supp. 2d 887 (D. Ariz. 2009).

3 U.S.—U. S. ex rel. Robinson v. York, 281 F. Supp. 8 (D. Conn. 1968).
N.J.—State v. Chambers, 63 N.J. 287, 307 A.2d 78 (1973).
Pa.—Com. v. Saunders, 459 Pa. 677, 331 A.2d 193 (1975).

4 Me.—State v. Houston, 534 A.2d 1293 (Me. 1987).

5 Miss.—Batiste v. State, 121 So. 3d 808 (Miss. 2013), cert. denied, 134 S. Ct. 2287, 189 L. Ed. 2d 178 (2014).

6 Tex.—Galloway v. State, 2003 WL 1712559 (Tex. Crim. App. 2003).

7 U.S.—Mitchell v. Untreiner, 421 F. Supp. 886 (N.D. Fla. 1976); Bukhari v. Hutto, 487 F. Supp. 1162 (E.D. Va. 1980); Dawson v. Kendrick, 527 F. Supp. 1252 (S.D. W. Va. 1981).

8 **Physical and mental health services**
The Equal Protection Clause requires that female inmates be treated in parity with male inmates with regard to the provision of physical and mental health services; unequal treatment of male and female inmates with serious mental illness resulted in a more egregious denial of mental health care for seriously ill female inmates and violated the inmates' equal protection rights in addition to Eighth Amendment rights against cruel and unusual punishment.
U.S.—Casey v. Lewis, 834 F. Supp. 1477 (D. Ariz. 1993).
Particular treatment
The equal protection rights of women prisoners at a state correctional center were not violated on the basis that the medical and psychiatric care available to women was allegedly not equal to that available to male prisoners at other facilities, that allegedly disparate wage rates were paid to male and female inmates for comparable work, or that female inmates had access to an allegedly less adequate law library than did male prisoners.

U.S.—Batton v. State Government of North Carolina, Executive Branch, 501 F. Supp. 1173 (E.D. N.C. 1980).

9 Or.—State v. Hodgdon, 31 Or. App. 791, 571 P.2d 557 (1977).

Male and female inmates not similarly situated

Inmates at Nebraska's only women's prison and inmates at a Nebraska penitentiary that housed only men were not "similarly situated," for purposes of prison programs and services, and thus, the female inmates had not suffered an equal protection violation even if their programs in 12 areas were inferior to those that male inmates received at the penitentiary.

U.S.—Klinger v. Department of Corrections, 31 F.3d 727 (8th Cir. 1994).

10 U.S.—Longoria v. Dretke, 507 F.3d 898 (5th Cir. 2007).

11 U.S.—Fegans v. Norris, 537 F.3d 897 (8th Cir. 2008).

12 Ark.—Waller v. Banks, 2013 Ark. 399, 2013 WL 5603930 (2013).

13 U.S.—Young v. County of Cook, 616 F. Supp. 2d 834 (N.D. Ill. 2009).

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§ 1302. Equal protection in education

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3394 to 3398

The denial to students of one sex of their constitutional right to an education equal with that offered members of the other sex violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

The denial to female students, on the basis of sex, of a constitutional right to education equal with that offered male students in a school operated by the state violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[1] Equal protection is not violated when a state offers optional, single-gender public schools so long as the State makes available to both genders "education equal" options.[2] However, the policy of a state-supported school, which limits its enrollment to women, of denying otherwise qualified men the right to enroll violates equal protection.[3] In order for a state to defend the operation of a male-only educational institution, it must demonstrate an "exceedingly persuasive justification" for the operation of the institution.[4]

A female student who is denied admission to a male-only, state-supported military college does not need to prove intentional or invidious discrimination by the state in order to establish a violation of the Equal Protection Clause.[5] Intentional or invidious

discrimination need only be shown when a statute or state-supported policy is gender-neutral and need not be proven when discrimination is the result of an explicit gender-based classification.[6]

A remedial plan for equal protection violations related to the exclusion of women from a citizen-soldier program, creating a separate program for women at another college, will not survive an equal protection evaluation if it does not afford both genders benefits that are comparable in substance.[7]

CUMULATIVE SUPPLEMENT

Cases:

Considerable deference is owed to a public university in defining intangible characteristics, like student body diversity, that are central to its identity and educational mission. Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Kirstein v. Rector and Visitors of University of Virginia, 309 F. Supp. 184 (E.D. Va. 1970).

2 U.S.—Reach Academy for Boys and Girls, Inc. v. Delaware Department of Education, 8 F. Supp. 3d 574, 309 Ed. Law Rep. 221 (D. Del. 2014), for additional opinion, see, 46 F. Supp. 3d 455, 314 Ed. Law Rep. 693 (D. Del. 2014).

3 U.S.—Mississippi University for Women v. Hogan, 458 U.S. 718, 102 S. Ct. 3331, 73 L. Ed. 2d 1090, 5 Ed. Law Rep. 103 (1982).

4 U.S.—U.S. v. Virginia, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996).

5 U.S.—Faulkner v. Jones, 51 F.3d 440, 99 Ed. Law Rep. 99 (4th Cir. 1995).

6 U.S.—Faulkner v. Jones, 51 F.3d 440, 99 Ed. Law Rep. 99 (4th Cir. 1995).

7 U.S.—U.S. v. Virginia, 518 U.S. 515, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996).

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PART VI. Privileges and Immunities; Equal Protection

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2. General Principles as Applied to Particular Matters

§ 1303. Equal protection in education—Participation in athletic activities

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3394 to 3398

The complete denial to a female student of any opportunity to play an interscholastic sport is a violation of the student's right to equal protection.

The complete denial to a female student of any opportunity to play an interscholastic sport is a violation of the student's right to equal protection.[1] A school athletic association rule prohibiting females from participating with males in interscholastic athletic programs also is subject to scrutiny under the Equal Protection Clause[2] and may violate the constitutional guarantee.[3] The operation of a public high school regulation which prohibits mixed sex competition in football and other specified sports is too broad to be valid under the Equal Protection Clause and must give way to the facts in particular cases.[4] Such a regulation has no reasonable relation to achievement of the governmental objective of protecting the health and safety of female students, for purposes of equal protection, where a particular girl is as fit or more to be on a squad than the weakest of the squad's male members, as in such a case, the effect of the regulation is to exclude qualified members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior.[5]

The standard for intercollegiate athletic programs under the Equal Protection Clause is one of comparability, not absolute equality, where male and female teams are given substantially equal support for substantially comparable programs.[6]

Where overall athletic opportunities for male students at schools still exceed those afforded their female counterparts, special recognition and favored treatment can be afforded members of the female sex without violation of equal protection principles.[7] Where limited athletic facilities make it necessary to schedule school male and female athletic teams in the same sport in two separate seasons, and neither season is substantially better than the other, that scheduling decision is not a denial of equal protection of the law.[8]

Right to be on team.

Under the Equal Protection Clause, a female has no right to a position on men's intercollegiate athletic team; rather, there is a right to compete for it on equal terms.[9]

Grooming codes for athletes.

Under the Equal Protection Clause, the pedagogical and caretaking responsibilities of schools give school officials substantial leeway in establishing grooming codes for their students generally and for their interscholastic athletes in particular, but that leeway does not permit them to impose nonequivalent burdens on school athletes based on their sex.[10]

Footnotes

1 U.S.—Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977).
Contact sports
Exclusion of girls from all contact sports in order to protect female high school athletes from an unreasonable risk of injury is not fairly and substantially related to a justifiable governmental objective, in the context of Fourteenth Amendment, in light of available alternatives, and since the demand for relief by the instant plaintiffs would be met by the establishment of a separate girls' team with comparable programs.
U.S.—Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117 (E.D. Wis. 1978).

2 U.S.—Morris v. Michigan State Bd. of Ed., 472 F.2d 1207 (6th Cir. 1973).

3 U.S.—Brenden v. Independent School Dist. 742, 477 F.2d 1292, 23 A.L.R. Fed. 649 (8th Cir. 1973).
Pa.—Com. By Packel v. Pennsylvania Interscholastic Athletic Ass'n, 18 Pa. Commw. 45, 334 A.2d 839 (1975).
High school football
Wash.—Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975).

4 U.S.—Lantz by Lantz v. Ambach, 620 F. Supp. 663, 28 Ed. Law Rep. 783 (S.D. N.Y. 1985).
Rule not subject to facial attack
A rule prohibiting girls' participation on boys' teams, if the school has a girls' program in sports, is not on its face directly susceptible of constitutional attack as violative of equal protection.
Ind.—Ruman v. Eskew, 165 Ind. App. 534, 333 N.E.2d 138 (1975).

5 U.S.—Lantz by Lantz v. Ambach, 620 F. Supp. 663, 28 Ed. Law Rep. 783 (S.D. N.Y. 1985).

6 U.S.—Mansourian v. Board of Regents of University of California at Davis, 816 F. Supp. 2d 869, 277 Ed. Law Rep. 735 (E.D. Cal. 2011).

7 N.Y.—Mularadelis v. Haldane Central School Bd., 74 A.D.2d 248, 427 N.Y.S.2d 458 (2d Dep't 1980).
Elimination of men's athletic team
A university's elimination of a men's athletic team rather than a women's athletic team classifies men for different treatment than women on the basis of gender, but the action does not deprive members of the men's athletic team equal protection.

U.S.—Kelley v. Board of Trustees, 35 F.3d 265, 94 Ed. Law Rep. 115 (7th Cir. 1994).

8 Minn.—Striebel v. Minnesota State High School League, 321 N.W.2d 400, 5 Ed. Law Rep. 245 (Minn. 1982).

Violation of equal protection shown

The scheduling of a female athletic team in a season that is outside the time period traditionally observed as the sport's official season is violative of equal protection, where it serves no important governmental objective.

W. Va.—State ex rel. Lambert by Lambert v. West Virginia State Bd. of Educ., 191 W. Va. 700, 447 S.E.2d 901, 6 A.D.D. 131, 93 Ed. Law Rep. 1031 (1994).

9 U.S.—Mansourian v. Board of Regents of University of California at Davis, 816 F. Supp. 2d 869, 277 Ed. Law Rep. 735 (E.D. Cal. 2011).

10 **Short hair for boys playing basketball**

U.S.—Hayden ex rel. A.H. v. Greensburg Community School Corp., 743 F.3d 569, 302 Ed. Law Rep. 61 (7th Cir. 2014).

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

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2. General Principles as Applied to Particular Matters

§ 1304. Equal protection in regard to family law matters

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3409, 3410

Domestic relations laws creating gender-based classifications must serve legitimate governmental objectives and be substantially related to the achievement of those objectives.

Laws dealing with domestic relations and family law matters which create gender-based classifications must serve legitimate governmental objectives and be substantially related to the achievement of those objectives.[1] A statute conditioning the right of a mother to bring a suit for injury or death of her child upon contingencies of death, desertion, or imprisonment of the father denies equal protection.[2]

Generally, alimony provisions of a divorce decree[3] and statutes providing for the division of marital property on divorce[4] do not violate the guaranty of equal protection. However, it is a denial of equal protection for a statute to authorize alimony for a wife but not for a husband[5] or to provide for awarding counsel fees only against males in a proceeding by a wife against her husband.[6] Statutes may avoid constitutional infirmity under the Equal Protection Clause by providing for either party to pay alimony[7] or by providing for the award of counsel fees to either party.[8]

Same-sex marriage.

Legislation prohibiting same-sex marriage creates a classification based on sexual orientation, rather than based on sex, where the distinction between same-gender and opposite-gender couples in the challenged legislation does not result in unequal treatment of men and women, but rather, persons of either gender are treated equally in that they are each permitted to marry only a person of the opposite gender.[9]

Doctrine of necessaries.

The doctrine of necessaries, under which a husband owes a duty of furnishing a wife with necessaries, including medical and hospital treatment for her care and comfort comporting with his station in life, denies husbands equal protection of the law, and therefore is unconstitutional, since it creates a gender-based classification that is not substantially related to serving important governmental interests.[10]

CUMULATIVE SUPPLEMENT

Cases:

The Constitution entitles same-sex couples to civil marriage on the same terms and conditions as opposite-sex couples. Pavan v. Smith, 2017 WL 2722472 (U.S. 2017).

[END OF SUPPLEMENT]

Footnotes

1 N.Y.—Gorsky v. Gorsky, 108 Misc. 2d 583, 438 N.Y.S.2d 196 (Sup 1981).
As to the applicability of the intermediate scrutiny and strict scrutiny tests in gender-based discrimination cases, see § 1165.
Common law right of dower
The common law right of dower is unconstitutional under the Equal Protection Clauses of the state and federal constitutions.
S.C.—Boan v. Watson, 281 S.C. 516, 316 S.E.2d 401 (1984).
Protection from creditors
A statute that protected a portion of a widow's share in her deceased spouse's real estate against certain creditors, but did not extend the same protection to widowers, violated equal protection, given the absence of justification for the preference to widows.
Ind.—Montgomery v. Estate of Montgomery, 677 N.E.2d 571 (Ind. Ct. App. 1997).
Statute restricting marital relation to male and female
A statute restricting the marital relation to a male and female is subject to the "strict scrutiny" test, on an equal protection challenge under the state constitution; the statute is presumed to be unconstitutional unless it can be shown that the statute's sex-based classification is justified by compelling state interests and that is narrowly drawn to avoid unnecessary abridgements of constitutional rights.
Haw.—Baehr v. Lewin, 74 Haw. 530, 74 Haw. 645, 852 P.2d 44 (1993), as clarified on reconsideration, (May 27, 1993).

2 Ind.—Kinslow v. Cook, 165 Ind. App. 623, 333 N.E.2d 819 (1975).
Right of action for sale of alcoholic beverages to underage child

A statute providing that a father or, if the father is dead, a mother, will have a right of action against any person who sells or furnishes alcoholic beverages to an underage child for the child's use, without the permission of the child's parent, created a gender classification which did not rest upon some ground of difference having a fair and substantial relation to the object of the legislation, and the statute therefore violated equal protection.

Ga.—Stepperson, Inc. v. Long, 256 Ga. 838, 353 S.E.2d 461 (1987).

Support proviso of wrongful death statute

The support proviso of a wrongful death statute, providing that a mother or father or both may maintain an action, as the plaintiff, for the injury or death of a child provided that, in the case of an illegitimate child, the father has regularly contributed to the child's support denies equal rights on account of sex in violation of the state constitution.

Wash.—Guard v. Jackson, 83 Wash. App. 325, 921 P.2d 544 (Div. 1 1996), aff'd, 132 Wash. 2d 660, 940 P.2d 642 (1997).

3 Ill.—Lane v. Lane, 35 Ill. App. 3d 276, 340 N.E.2d 705 (1st Dist. 1975).

Earning capacity of parties

In a proceeding in which alimony provided for in a divorce decree was increased, giving consideration to the former husband's earning capacity but not to the former wife's earning capacity, was not a denial of equal protection.

N.C.—Broughton v. Broughton, 58 N.C. App. 778, 294 S.E.2d 772 (1982).

4 Del.—M. v. M., 321 A.2d 115 (Del. 1974).

Tenn.—Mitchell v. Mitchell, 594 S.W.2d 699 (Tenn. 1980).

5 U.S.—Orr v. Orr, 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979).

N.Y.—Goodell v. Goodell, 77 A.D.2d 684, 429 N.Y.S.2d 789 (3d Dep't 1980).

Tenn.—Mitchell v. Mitchell, 594 S.W.2d 699 (Tenn. 1980).

Alimony pendente lite or temporary alimony

La.—Smith v. Smith, 382 So. 2d 972 (La. Ct. App. 1st Cir. 1980).

Modification of alimony

A "live in lover" statute is unconstitutional, as it provides only for modification of alimony awarded to a wife, a classification by gender violative of the Fourteenth Amendment's Equal Protection Clause.

Ga.—Sims v. Sims, 243 Ga. 275, 253 S.E.2d 762 (1979).

6 N.Y.—Matter of Proceeding for Support Under Article 4 of Family Court Act, 85 Misc. 2d 637, 380 N.Y.S.2d 904 (Fam. Ct. 1976).

7 Conn.—Fattibene v. Fattibene, 183 Conn. 433, 441 A.2d 3 (1981).

Pa.—Com. ex rel. Lukens v. Lukens, 224 Pa. Super. 227, 303 A.2d 522 (1973).

Wyo.—Sanches v. Sanches, 626 P.2d 61 (Wyo. 1981).

Sex-based distinction remedied by application to both spouses

A provision of the Bankruptcy Act exempting from discharge an obligation for maintenance or support of the "wife" is not unconstitutional on equal protection grounds where the sex-based distinction is remedied by extending the benefits of the Act to the husband.

U.S.—Erspan v. Badgett, 647 F.2d 550 (5th Cir. 1981); Matter of Crist, 460 F. Supp. 891 (N.D. Ga. 1978), judgment aff'd, 632 F.2d 1226 (5th Cir. 1980).

8 N.Y.—Seward v. Seward, 75 A.D.2d 583, 426 N.Y.S.2d 798 (2d Dep't 1980).

9 N.M.—Griego v. Oliver, 2014-NMSC-003, 316 P.3d 865 (N.M. 2013).

10 Ala.—Emanuel v. McGriff, 596 So. 2d 578 (Ala. 1992).

N.J.—Jersey Shore Medical Center-Fitkin Hospital v. Baum's Estate, 84 N.J. 137, 417 A.2d 1003, 11 A.L.R.4th 1147 (1980).

N.Y.—Medical Business Associates, Inc. v. Steiner, 183 A.D.2d 86, 588 N.Y.S.2d 890 (2d Dep't 1992).

Doctrine of necessaries expanded to apply to husbands and wives

The common law doctrine of necessaries violated the constitution guarantee of equal protection, insofar as the doctrine was applied to husbands only; accordingly, the doctrine would be expanded to apply to husbands and wives equally rather than completely abolished.

Kan.—St. Francis Regional Medical Center, Inc. v. Bowles, 251 Kan. 334, 836 P.2d 1123 (1992).

Doctrine abrogated

The common law doctrine of necessaries was abrogated, due to equal protection considerations that demand equality between the sexes, inasmuch as a husband could no longer be held liable for the wife's necessaries

under the doctrine, given the state supreme court's previous determination that the doctrine did not apply to make a wife liable for a husband's necessaries.
Fla.—Connor v. Southwest Florida Regional Medical Center, Inc., 668 So. 2d 175 (Fla. 1995).

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§ 1305. Equal protection in regard to family law matters —Child custody and support; consent to adoption

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3409, 3411, 3412

Various matters pertaining to child custody and support and consent to adoption have been adjudicated in the context of challenges based on violations of equal protection.

Statutory classifications of natural parents based on sex are suspect under the Fourteenth Amendment.[1] However, equal protection does not prohibit the state from treating a birth mother with an established custodial relationship with the child more favorably than a putative father who does not have an established relationship with the child.[2] Moreover, statutes giving a mother not married to the child's biological father sole physical custody until a determination of paternity or an order granting custody to another do not violate equal protection based on gender since, with respect to a child born outside of marriage, a biological father is not similarly circumstanced with the mother in that the mother is readily identifiable while the father might not be identifiable.[3]

Child-support obligations.

Equal protection requires a uniform standard of parental liability for child support regardless of sex.[4] The traditional and statutory notion that a father has the primary obligation to support his children neither reflects the realities of modern life nor complies with the constitutional requirements of equal protection.[5] A statutory provision that a father must pay for his child's support a fair and reasonable sum according to his means, while a mother becomes liable only if the father is dead, incapable of supporting his child, or cannot be found, is unconstitutional as violative of the equal protection guaranty.[6] However, a statute governing the failure to pay child support which targets noncustodial parents does not discriminate against men in violation of equal protection.[7]

Consent to adoption.

The Equal Protection Clause may be violated by the application of a statutory provision permitting an unwed mother, but not an unwed father, to block the adoption of a child simply by withholding consent.[8] However, the granting of an adoption of an illegitimate child without the father's consent, when the father has been found to be unfit after proper notice and hearing, does not constitute a denial of the constitutional guarantee of equal protection.[9] Moreover, a statute requiring the consent of a father for adoption of a child born out-of-wedlock if the father meets certain requirements does not violate the father's equal protection rights, even though it sets out requirements for unwed fathers to establish a right to veto an adoption while not requiring such a showing for married fathers or any mothers, where the requirements set out by the statute to demonstrate a father's relationship with the child substantially relate to the government's interest of ensuring the welfare of a child born out-of-wedlock.[10]

Footnotes

1 U.S.—Pina v. Mukasey, 542 F.3d 5 (1st Cir. 2008).

2 Minn.—Heidbreder v. Carton, 645 N.W.2d 355 (Minn. 2002).

Awarding of custody based on maternal preference

An ex parte order awarding custody of the parties' children pending a divorce proceeding did not violate the equal rights provision of the state constitution by awarding custody based on a maternal preference, since the order merely preserved the status quo before the pendente lite hearing, and nothing indicated that the trial court used a maternal preference in determining that the children should remain with their mother pending a further determination.

Md.—Magness v. Magness, 79 Md. App. 668, 558 A.2d 807 (1989).

Entry of child's name on birth certificate

A statute allowing the parent with the actual or legal custody of a child at the time of the preparation of the birth certificate to enter the child's name on the certificate is gender-neutral and not violative of equal protection despite maternal custody in most instances.

Wis.—Steinbach v. Gustafson, 177 Wis. 2d 178, 502 N.W.2d 156 (Ct. App. 1993).

3 Minn.—In re Custody of J.J.S., 707 N.W.2d 706 (Minn. Ct. App. 2006).

4 N.Y.—Carole K. v. Arnold K., 85 Misc. 2d 643, 380 N.Y.S.2d 593 (Fam. Ct. 1976), on reh'g on other grounds, 87 Misc. 2d 547, 385 N.Y.S.2d 740 (Fam. Ct. 1976).

Paternity Act nondiscriminatory

U.S.—Dubay v. Wells, 506 F.3d 422, 69 Fed. R. Serv. 3d 405 (6th Cir. 2007).

5 N.Y.—Lord v. Lord, 96 Misc. 2d 434, 409 N.Y.S.2d 46 (Sup 1978).

6 N.Y.—Carole K. v. Arnold K., 85 Misc. 2d 643, 380 N.Y.S.2d 593 (Fam. Ct. 1976), on reh'g on other grounds, 87 Misc. 2d 547, 385 N.Y.S.2d 740 (Fam. Ct. 1976).

7 U.S.—U.S. v. Nichols, 928 F. Supp. 302 (S.D. N.Y. 1996), aff'd, 113 F.3d 1230 (2d Cir. 1997).

8 U.S.—Caban v. Mohammed, 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979).

Situation requiring paternal consent

Application of a statute which does not require the consent of a father to adoption of his illegitimate child would be unconstitutional as an infringement upon the father's equal protection guaranties when applied to

situation where the child was several years old, the father had established a closeknit familial relationship with the child and the child's mother, and the father had supported and nurtured the mother and child.

Kan.—Matter of Adoption of Baby Boy L., 231 Kan. 199, 643 P.2d 168 (1982) (overruled on other grounds by, In re A.J.S., 288 Kan. 429, 204 P.3d 543 (2009)).

Effect of lack of established relationship with child

A putative father and the birth mother of a child born out of wedlock are not similarly situated, for purposes of an equal protection analysis, with respect to their relationship to the child, and thus, a putative father is not entitled to the same opportunity as the birth mother to voice an opinion as to child's best interests or to block a child's adoption by withholding consent thereto, where the birth mother has an established custodial relationship with the child under state law, and where the putative father does not have an established relationship with the child.

Minn.—Heidbreder v. Carton, 645 N.W.2d 355 (Minn. 2002).

9 Kan.—Matter of Adoption of Baby Boy L., 231 Kan. 199, 643 P.2d 168 (1982) (overruled on other grounds by, In re A.J.S., 288 Kan. 429, 204 P.3d 543 (2009)).

Termination of parental rights

A statutory distinction between the grounds for termination of parental rights of unwed fathers whose children were subject to adoption and of unwed fathers whose children were not subject to adoption was rationally related to the state's legitimate interests in providing for the welfare of children, and did not violate equal protection, where the difference in treatment was based upon different circumstances and minimized the disruption of children's lives, and an unwed father who provided support for the mother or child was afforded the same protections from termination as an unwed father whose child was not subject to adoption.

Mich.—In re RFF, 242 Mich. App. 188, 617 N.W.2d 745 (2000).

10 N.Y.—In re St. Vincent's Services, Inc., 17 Misc. 3d 443, 841 N.Y.S.2d 834 (Fam. Ct. 2007).

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§ 1306. Equal protection in regard to family law matters—Abortion

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3386, 3425

The courts have ruled on a variety of challenges to abortion statutes on equal protection grounds.

An abortion statute does not violate a constitutional guarantee of the Equal Protection Clause by imposing a burden only upon women's reproductive choices and bodily integrity, since men and women are not similarly situated with respect to the ability to carry a child, and thus, prohibiting elective abortions does not result in impermissible sex-based classifications.[1] When the state interest asserted to support a law singling out abortion from comparably risky procedures sought by men is maternal health, it is not necessary, in considering an equal protection challenge, to determine whether the classification should be deemed gender-neutral, as a first step in analyzing the statute under an intermediate scrutiny standard.[2] Rather, the interests at stake should be balanced, applying a standard calling for invalidation when a statute imposes an undue burden on women seeking abortion.[3]

Footnotes

1 U.S.—Jane L. v. Bangerter, 794 F. Supp. 1528 (D. Utah 1992).

2 U.S.—Tucson Woman's Clinic v. Eden, 379 F.3d 531 (9th Cir. 2004).

3 U.S.—Tucson Woman's Clinic v. Eden, 379 F.3d 531 (9th Cir. 2004).

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§ 1307. Equal protection in regard to jury selection, composition, and conduct

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3427 to 3429

The arbitrary exclusion of persons from jury service, on the basis of gender, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Intentional discrimination in the jury selection process by state actors,[1] even partially[2] on the basis of gender, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[3] For example, a statute providing for the excuse of mothers with childrearing responsibilities from jury service which does not extend its benefits to fathers and their children violates the Equal Protection Clause.[4] Moreover, a statute entitling women to an exemption from jury service denies an accused equal protection where there is no compelling state interest which requires the exemption of women from jury service solely by reason of sex.[5] The equal protection right to jury selection procedures free from discrimination based on gender extends to potential jurors as well as litigants.[6]

Use of peremptory challenges.

The State may not, during the jury selection process, use its peremptory challenges to exclude otherwise unbiased and well-qualified individuals solely on the basis of their gender, and such purposeful exclusions violate the constitutional right to equal protection of the laws of both the defendant and the potential jurors.[7] The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits discrimination in jury selection on the basis of gender or the assumption that a venireperson will be biased in a particular case for no reason other than the person's gender.[8] The Equal Protection Clause therefore is violated when the prosecution or the defense, in the exercise of peremptory challenges in a criminal case, excludes jurors solely on the basis of their gender.[9] Even the exercise of a peremptory strike motivated only in part by an impermissible consideration of gender violates equal protection.[10] However, although the elimination of even one juror on the basis of gender violates equal protection, the elimination of a member of a particular gender as a juror by peremptory challenge without more does not make a prima facie showing of gender discrimination.[11]

CUMULATIVE SUPPLEMENT

Cases:

Evidence supported trial court's finding that defendant's proffered explanations for striking male prospective juror, that juror was an engineer who worked for a corporation and was single with no children, were pretext for gender discrimination, in trial for first degree assault and armed criminal action, although whether juror had children was a potentially important factor to defendant's defense-of-another argument that he had acted in defense of his mother; there were similarly situated female jurors who were both single and had no children and who were not struck, and there was no logical connection between the struck juror's employment and the case to be tried. State v. McKenzie, 599 S.W.3d 269 (Mo. Ct. App. S.D. 2020), reh'g and/or transfer denied, (Mar. 19, 2020) and transfer denied, (June 2, 2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994).

2 D.C.—Robinson v. U.S., 890 A.2d 674 (D.C. 2006).

3 U.S.—J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994).
Colo.—People v. Beauvais, 2014 COA 143, 2014 WL 5369810 (Colo. App. 2014).
Fla.—Sabine v. State, 58 So. 3d 943 (Fla. 2d DCA 2011).
Ga.—Reid v. State, 298 Ga. App. 889, 681 S.E.2d 671 (2009).
La.—State v. Bourque, 114 So. 3d 642 (La. Ct. App. 3d Cir. 2013), writ denied, 134 So. 3d 1187 (La. 2014).
Miss.—States v. State, 88 So. 3d 749 (Miss. 2012).
N.C.—State v. Maness, 363 N.C. 261, 677 S.E.2d 796 (2009).
A.L.R. Library
Exclusion of women from grand or trial jury or jury panel in criminal case as violation of constitutional rights of accused or as ground for reversal of conviction—state cases, 70 A.L.R.5th 587.

4 Fla.—Anthony v. Alachua County Court Executive, 403 So. 2d 1085 (Fla. 1st DCA 1981), decision aff'd, 418 So. 2d 264 (Fla. 1982); Alachua County Court Executive v. Anthony, 418 So. 2d 264 (Fla. 1982).

5 N.Y.—People v. Moss, 80 Misc. 2d 633, 366 N.Y.S.2d 522 (Sup 1975).

6 Fla.—Sabine v. State, 58 So. 3d 943 (Fla. 2d DCA 2011).

7 N.M.—State v. House, 1999-NMSC-014, 127 N.M. 151, 978 P.2d 967 (1999).
Violation of equal protection and civil rights law
The exercise of peremptory challenges based solely on gender violates the Equal Protection Clause of the state constitution as well as violating the state civil rights law.

N.Y.—People v. Blunt, 162 A.D.2d 86, 561 N.Y.S.2d 90 (2d Dep't 1990).

8 Ga.—Whitaker v. State, 269 Ga. 462, 499 S.E.2d 888 (1998).

Applicability of racial discrimination principles

The approach in *Batson v. Kentucky* to alleged racial discrimination in the use of peremptory challenges applies in the context of gender discrimination; under that approach, the defendant first must make a prima facie showing that the State has exercised peremptory challenges on the basis of gender, whereupon the burden shifts to the state to give gender-neutral explanations, and the trial court decides whether the defendant has carried the burden of proving purposeful discrimination in violation of the Equal Protection Clause.

Ill.—People v. Blackwell, 171 Ill. 2d 338, 216 Ill. Dec. 524, 665 N.E.2d 782 (1996).

As to analysis of racial discrimination in the composition of juries under *Batson*, see §§ 1287, 1288.

9 U.S.—U.S. v. Omoruyi, 7 F.3d 880 (9th Cir. 1993).

Ark.—Cleveland v. State, 318 Ark. 738, 888 S.W.2d 629 (1994).

Ind.—Koo v. State, 640 N.E.2d 95 (Ind. Ct. App. 1994).

Ky.—Meece v. Com., 348 S.W.3d 627 (Ky. 2011).

Tenn.—State v. Hugueley, 185 S.W.3d 356 (Tenn. 2006).

Wash.—State v. Burch, 65 Wash. App. 828, 830 P.2d 357 (Div. 1 1992).

Duty of court to require nondiscriminatory explanation

When a prima facie case of discrimination, by the defense's use of peremptory challenges against potential jurors because of their race, religion, sex, or ancestry, is established, it is incumbent upon the court to require a nondiscriminatory explanation of the challenge to show that the challenge is not made on a prohibited discriminatory basis.

Haw.—State v. Levinson, 71 Haw. 492, 795 P.2d 845 (1990).

10 D.C.—Robinson v. U.S., 890 A.2d 674 (D.C. 2006).

11 Wis.—In re Paternity of Codey M.R., 186 Wis. 2d 580, 522 N.W.2d 222 (Ct. App. 1994).

Gender-neutral reasons for exclusion shown

The fact that a female prospective juror's teen-aged son had spent time in a youth detention center and the fact that the juror had laughed at inappropriate moments during the voir dire were gender-neutral reasons for exercising one of 10 peremptory challenges striking women from the petit jury, and the strike therefore did not violate the Equal Protection Clause.

Ga.—Pickren v. State, 272 Ga. 421, 530 S.E.2d 464 (2000).

Reasons for exercise of peremptory strikes properly accepted

The trial court did not abuse its discretion by accepting, in an equal protection inquiry regarding a prosecutor's reasons for exercising peremptory strikes against two male jurors, in a prosecution of a male defendant for sexual assault, that one juror did not seem interested in being a juror and that the other was not paying attention to the prosecutor's questions.

Wyo.—Beartusk v. State, 6 P.3d 138 (Wyo. 2000).

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§ 1308. Equal protection in employment and occupations

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3389, 3391, 3392

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, as enforced by statute, forbids discrimination in employment on the basis of sex, and employment discrimination based on gender can only be tolerated if the State provides an exceedingly persuasive justification for the rule or practice at issue.

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, as enforced by statute, forbids discrimination in employment on the basis of sex.[1] In order to constitute a violation of the Equal Protection Clause, a statute ordinarily must reflect a purpose to discriminate on the basis of sex.[2] Where a statute does not officially distinguish between the sexes, an equal protection claim can succeed only if the statute has an invidious purpose.[3]

Employment discrimination based on gender, once proven, can be tolerated under the Equal Protection Clause only if the State provides an exceedingly persuasive justification for the rule or practice.[4] A state legislature may not, under the guise of regulating a business or occupation, make unreasonable gender-based classifications.[5]

It is impermissible to employ gender-based distinctions premised upon archaic and overbroad stereotypes regarding the economic dependency of women and thus to deny a female wage earner protection for her family equal to that afforded a comparable male wage earner.[6] In this connection, a law applying a conclusive presumption of total dependency to widows, but not to widowers, of deceased employees denies equal protection of the laws.[7]

Massage parlor ordinances prohibiting opposite sex massages are not violative of the Equal Protection Clause[8] unless there are less intrusive means available under existing laws prohibiting conduct which is obscene or is a public nuisance.[9] Such an ordinance creates no inherently suspect classification and touches upon no fundamental interest,[10] and the classification created has a rational basis.[11]

Affirmative action.

The use of an affirmative action override for the purpose of promoting equal employment opportunities for women is not a denial of equal protection.[12] However, the existence of a racial imbalance, or of a disproportionate representation of the sexes, does not in and of itself give rise to a compelling state interest sufficient to warrant the preferential treatment implicit in an affirmative action hiring classification based on sex.[13]

An ordinance establishing a set-aside program for female-operated city contractors is subject to intermediate scrutiny; it has to serve important governmental objectives while the means chosen have to be substantially related to those objectives.[14]

Footnotes

1 U.S.—Curran v. Portland Superintending School Committee, City of Portland, Me., 435 F. Supp. 1063, 46 A.L.R. Fed. 304 (D. Me. 1977); Hall v. Brown, 489 F. Supp. 2d 166 (N.D. N.Y. 2007).

Federal Equal Pay Act as enforcement statute

U.S.—Hundertmark v. State of Florida Dept. of Transp., 205 F.3d 1272 (11th Cir. 2000).

Under federal and state civil rights acts

(1) "Sex plus" or "gender plus" discrimination, involving a policy or practice by which an employer classifies employees on the basis of sex plus another characteristic, is actionable in a case under 42 U.S.C.A. § 1983, inasmuch as the Equal Protection Clause forbids sex discrimination no matter how it is labeled; the relevant issue is not how the claim is characterized but whether the plaintiff provides evidence of purposefully sex-discriminatory acts.

U.S.—Back v. Hastings On Hudson Union Free School Dist., 365 F.3d 107, 187 Ed. Law Rep. 13 (2d Cir. 2004).

(2) The goal of the legislature in adopting a state civil rights act was to broaden the scope, rather than the standard, of equal protection, and a challenge to a township's operation of a basketball program for elementary students requiring separate gender-based leagues was subject to a constitutional equal protection analysis.

Mich.—Department of Civil Rights ex rel. Forton v. Waterford Tp. Dept. of Parks and Recreation, 425 Mich. 173, 387 N.W.2d 821 (1986).

A.L.R. Library

Federal and State Constitutional Provisions as Prohibiting Discrimination in Employment on Basis of Gay, Lesbian, or Bisexual Sexual Orientation or Conduct, 96 A.L.R.5th 391.

2 Iowa—Sherman v. Pella Corp., 576 N.W.2d 312 (Iowa 1998).

Stereotyping as evidence of impermissible, sex-based motive

Stereotyping of women as caregivers can, by itself and without more, be evidence of an impermissible, sex-based motive for an adverse employment decision, in violation of equal protection principles.

U.S.—Back v. Hastings On Hudson Union Free School Dist., 365 F.3d 107, 187 Ed. Law Rep. 13 (2d Cir. 2004).

3 N.J.—Greenberg v. Kimmelman, 99 N.J. 552, 494 A.2d 294 (1985).

4 U.S.—Back v. Hastings On Hudson Union Free School Dist., 365 F.3d 107, 187 Ed. Law Rep. 13 (2d Cir. 2004).

Family-leave provision of Family and Medical Leave Act

Congress acted within its authority, under the enforcement section of the Fourteenth Amendment, when it sought to abrogate Eleventh Amendment immunity for purposes of the family-leave provision of the Family and Medical Leave Act, as the provision is congruent and proportional to the targeted gender discrimination.

U.S.—Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003).

5 Wash.—J. S. K. Enterprises, Inc. v. City of Lacey, 6 Wash. App. 43, 492 P.2d 600 (Div. 2 1971), adhered to, 6 Wash. App. 433, 493 P.2d 1015 (Div. 2 1972).

Workers' compensation statute

A workers' compensation statute, providing a male worker with an increase in benefits if he has a wife living with him at the time of his injury, while no similar provision is made for an injured female employee whose husband lives with her, was an unconstitutional denial of equal protection on the basis of gender.

Mich.—Pike v. City of Wyoming, 431 Mich. 589, 433 N.W.2d 768 (1988).

6 U.S.—Bowen v. Hackett, 361 F. Supp. 854 (D.R.I. 1973), opinion supplemented on other grounds, 387 F. Supp. 1212 (D.R.I. 1975).

Gender discrimination based on stereotype

The view that a female employee could not be a good mother and have a job requiring long hours, or that a mother who received tenure in a public school administrative position would not show her prior level of commitment because she had "little ones at home," could be evidence of gender discrimination based on a stereotype which supported a school employee's equal protection claims notwithstanding the contention that such stereotypes could not be presumed to be gender-based without comparative evidence of what was said about fathers.

U.S.—Back v. Hastings On Hudson Union Free School Dist., 365 F.3d 107, 187 Ed. Law Rep. 13 (2d Cir. 2004).

7 U.S.—Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 100 S. Ct. 1540, 64 L. Ed. 2d 107 (1980).

Tenn.—Davis v. Aetna Life and Cas. Co., 603 S.W.2d 718 (Tenn. 1980).

Remedy

A conclusive presumption of a widow's dependency on her husband's financial support would be invalidated so that all surviving spouses would be required to prove their dependency in fact.

Mich.—Day v. W. A. Foote Memorial Hospital, Inc., 412 Mich. 698, 316 N.W.2d 712 (1982).

8 U.S.—Colorado Springs Amusements, Ltd. v. Rizzo, 524 F.2d 571 (3d Cir. 1975).

Mich.—Gora v. City of Ferndale, 456 Mich. 704, 576 N.W.2d 141 (1998).

Utah—Redwood Gym v. Salt Lake County Commission, 624 P.2d 1138 (Utah 1981).

9 Ill.—Wheeler v. City of Rockford, 69 Ill. App. 3d 220, 25 Ill. Dec. 702, 387 N.E.2d 358 (2d Dist. 1979).

Wash.—J. S. K. Enterprises, Inc. v. City of Lacey, 6 Wash. App. 43, 492 P.2d 600 (Div. 2 1971), adhered to, 6 Wash. App. 433, 493 P.2d 1015 (Div. 2 1972).

10 Utah—Redwood Gym v. Salt Lake County Commission, 624 P.2d 1138 (Utah 1981).

As to strict scrutiny of suspect classifications, see § 1282.

11 U.S.—Garaci v. City of Memphis, 379 F. Supp. 1393 (W.D. Tenn. 1974).

As to the rational or reasonable basis test, generally, see § 1279.

12 U.S.—Equal Employment Opportunity Commission v. American Tel. & Tel. Co., 419 F. Supp. 1022 (E.D. Pa. 1976), judgment aff'd, 556 F.2d 167 (3d Cir. 1977).

13 Cal.—Hiatt v. City of Berkeley, 130 Cal. App. 3d 298, 181 Cal. Rptr. 661 (1st Dist. 1982).

14 U.S.—Arrow Office Supply Co. v. City of Detroit, 826 F. Supp. 1072 (E.D. Mich. 1993).

As to minority set-aside programs in conjunction with public contracts, see § 1286.

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16B C.J.S. Constitutional Law § 1309

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

B. Gender-Based Discrimination

2. General Principles as Applied to Particular Matters

§ 1309. Equal protection in employment and occupations—Public employees

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3390 to 3392

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, as enforced by statute, forbids discrimination in employment by the government on the basis of sex.

The Equal Protection Clause of the Fourteenth Amendment, as enforced by statute, forbids discrimination in employment on the basis of sex in public employment.[1] Individuals have a clear right, protected by the Fourteenth Amendment, to be free from discrimination on the basis of sex in public employment,[2] and this extends to protection from hostile work environments[3] and disparate treatment.[4] Any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause.[5]

The constitutional guaranty grants to public employees a federal constitutional right to be free from gender discrimination unless a gender classification serves important governmental objectives and is substantially related to the achievement of those objectives.[6] If employment decisions or policies in the public employment area are made in part because they would accomplish the collateral goal of keeping women in a stereotypic and predefined place, the Federal Constitution is violated.[7] However,

when the entity or person creating the sex discrimination justifies it by demonstrating that all or substantially all members of the other sex could not satisfactorily perform the functions of the particular employment, a qualification limiting the employment to one sex is justified by a compelling state interest under an equal protection analysis.[8]

Employment practices generally do not violate the Equal Protection Clause absent evidence that the public employer's actions are motivated by discriminatory intent.[9] In the context of an equal protection claim arising from alleged gender-based employment discrimination, the motivating factor test can be satisfied by proof that the conduct of the alleged discriminator was substantially motivated by discrimination, and a jury can find the necessary causation by concluding that the discriminatory action proximately led to the ultimate decision being challenged.[10]

Firing transgender employee on basis of gender nonconformity.

Firing a transgender public employee on the basis of the employee's gender nonconformity violates the Equal Protection Clause; a supervisor's purported concern that other employees might object to the transgender employee's restroom use is not a sufficiently important governmental interest to justify the termination.[11]

CUMULATIVE SUPPLEMENT

Cases:

Conclusory allegation by female African-American former state employee, a specialty dockets coordinator for county municipal court, that state court judge was hostile and intimidating to employee personally was insufficient to state a § 1983 Equal Protection hostile work environment claim against judge. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983. Boxill v. O'Grady, 935 F.3d 510 (6th Cir. 2019).

White male police officer who was placed on administrative leave after failing the balance portion of a physical-fitness test, and another white male police officer who was placed on administrative leave after failing an agility test, were not similarly situated in all material respects with plaintiff African-American female police officer, as would be required for plaintiff's prima facie showing of intentional discrimination under Supreme Court's *McDonnell Douglas* burden-shifting framework, in action under Title VII, the Equal Protection Clause, and § 1981, alleging race discrimination and gender discrimination, where plaintiff returned to work after a heart attack, her doctor would not recommend stun-gun training involving five-second shock from a stun gun or pepper-spray training, and she was placed on administrative leave based on unapproved leave of absence after she had failed to apply for FMLA leave and had exhausted her other leave; plaintiff and putative comparators were placed on administrative leave years apart, pursuant to altogether different personnel policies, and for altogether different underlying medical conditions, i.e., putative comparators had conditions that apparently were temporary, while plaintiff and her doctor described her condition as permanent or chronic. U.S. Const. Amend. 14; Family and Medical Leave Act of 1993, § 2 et seq., 29 U.S.C.A. § 2601 et seq.; 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq. Lewis v. City of Union City, Georgia, 918 F.3d 1213 (11th Cir. 2019).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Schaefer v. Tannian, 394 F. Supp. 1128 (E.D. Mich. 1974); Harbert v. Rapp, 415 F. Supp. 83 (W.D. Okla. 1976).

2 U.S.—Raspardo v. Carlone, 770 F.3d 97 (2d Cir. 2014); Duckworth v. St. Louis Metropolitan Police Dept., 491 F.3d 401 (8th Cir. 2007).

Denial of health-insurance benefits to same-sex partners

A state university system's policy of denying health-insurance benefits to unmarried same-sex partners of public employees, while granting the benefits to unmarried opposite-sex couples, was not rationally related to a legitimate government interest, was not justified by administrative efficiency, and violated equal protection; the policy allowed the partner of a heterosexual employee to qualify for benefits by signing an affidavit of common law marriage even if they were unable to establish a common law marriage and were not legally married, but the policy did not allow the same-sex partner of a homosexual or bisexual employee to qualify for benefits by signing the same affidavit, and marital status thus was not the defining difference between the classes.

Mont.—Snetsinger v. Montana University System, 2004 MT 390, 325 Mont. 148, 104 P.3d 445, 194 Ed. Law Rep. 966 (2004).

3 U.S.—Raspardo v. Carlone, 770 F.3d 97 (2d Cir. 2014).

Sexual harassment

U.S.—Lauderdale v. Texas Dept. of Criminal Justice, Institutional Div., 512 F.3d 157 (5th Cir. 2007).

4 U.S.—Raspardo v. Carlone, 770 F.3d 97 (2d Cir. 2014).

5 U.S.—Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979).

Gender-based stereotyping

A school district, a superintendent, personnel director, and a principal could be liable for employment discrimination, based on alleged gender-based stereotyping regarding the employment suitability of women with young children, in violation of the equal protection rights of a terminated school psychologist, even if, as alleged, 85% of the teachers employed at the school were women and 71% of those women had children, in that the relevant issue was how the psychologist was treated.

U.S.—Back v. Hastings On Hudson Union Free School Dist., 365 F.3d 107, 187 Ed. Law Rep. 13 (2d Cir. 2004).

6 U.S.—Marshall v. Kirkland, 602 F.2d 1282, 27 Fed. R. Serv. 2d 1322 (8th Cir. 1979).

Congressional staff member

U.S.—Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979).

Violation of equal protection shown

A school district's rule prohibiting a lesbian teacher from discussing her sexual orientation, while not forbidding other teachers from discussing their heterosexual orientations, violated the lesbian teacher's rights to equal protection.

U.S.—Weaver v. Nebo School Dist., 29 F. Supp. 2d 1279 (D. Utah 1998).

A.L.R. Library

Federal and State Constitutional Provisions as Prohibiting Discrimination in Employment on Basis of Gay, Lesbian, or Bisexual Sexual Orientation or Conduct, 96 A.L.R.5th 391.

7 U.S.—Marshall v. Kirkland, 602 F.2d 1282, 27 Fed. R. Serv. 2d 1322 (8th Cir. 1979).

8 Cal.—Long v. State Personnel Bd., 41 Cal. App. 3d 1000, 116 Cal. Rptr. 562 (3d Dist. 1974).

9 U.S.—Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wis. 1982).

10 U.S.—Back v. Hastings On Hudson Union Free School Dist., 365 F.3d 107, 187 Ed. Law Rep. 13 (2d Cir. 2004).

11 U.S.—Glenn v. Brumby, 663 F.3d 1312, 84 A.L.R. Fed. 2d 519 (11th Cir. 2011).

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

B. Gender-Based Discrimination

2. General Principles as Applied to Particular Matters

§ 1310. Equal protection in regard to Social Security benefits

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3386

The courts have ruled on a variety of challenges to Social Security statutes on equal protection grounds.

A provision of the Social Security Act (SSA) granting benefits to families whose dependent children are deprived of parental support because of unemployment of the father, but denying benefits in the case of unemployment of the mother,[1] and a gender-based distinction in a requirement of the Social Security Act for entitlement to spousal benefits in which a man is required to show support or dependency while a female is not,[2] violate equal protection. In addition, a provision of the Social Security Act that grants survivors' benefits based on earnings of a deceased husband and father covered by the Act both to his widow and to the couple's minor children in her care, but grants benefits based on earnings of a covered deceased wife and mother only to the minor children and not to the widower, violates the right to equal protection.[3]

On the other hand, under a pension offset provision that requires reduction of spousal benefits by the amount of certain government pensions received by the Social Security applicant, an offset exception is constitutional even though the exception temporarily revives gender-based eligibility requirements previously invalidated.[4] Moreover, a provision requiring a claimant over the age of 31 to have worked 20 of the previous 40 quarters in order to qualify for Social Security disability benefits does

not violate the Equal Protection Clause, since the provision is gender-neutral on its face, and although it has a disparate adverse impact on women, who are more likely than men to leave the workforce to raise their children, there is no evidence that the provision was motivated by an invidious discriminatory purpose, and the provision is rationally related to the legitimate purpose of limiting SSA protection to those persons no longer able to work who were dependent on their earnings.[5] Also, a provision that a child will be deemed dependent on a stepparent, so as to be entitled to childhood insurance benefits upon the stepparent's death, if the child is receiving at least one-half of his or her support from the stepparent does not violate equal protection by treating stepchildren of women less favorably than stepchildren of men.[6]

Footnotes

1 U.S.—Califano v. Westcott, 443 U.S. 76, 99 S. Ct. 2655, 61 L. Ed. 2d 382 (1979).

2 U.S.—Califano v. Goldfarb, 430 U.S. 199, 97 S. Ct. 1021, 51 L. Ed. 2d 270 (1977); Moss v. Secretary of Health, Ed. and Welfare, 408 F. Supp. 403 (M.D. Fla. 1976).

3 U.S.—Weinberger v. Wiesenfeld, 420 U.S. 636, 95 S. Ct. 1225, 43 L. Ed. 2d 514 (1975).

4 U.S.—Heckler v. Mathews, 465 U.S. 728, 104 S. Ct. 1387, 79 L. Ed. 2d 646 (1984).

5 U.S.—Collier v. Barnhart, 473 F.3d 444 (2d Cir. 2007).

6 U.S.—Reutter ex rel. Reutter v. Barnhart, 372 F.3d 946 (8th Cir. 2004).

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

B. Gender-Based Discrimination

2. General Principles as Applied to Particular Matters

§ 1311. Equal protection pertaining to other particular matters

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3384, 3415

Various sexually discriminatory classifications violate the constitutional guarantee of equal protection.

A statute which provides that, as between persons equally qualified to administer estates, males must be preferred to females is based solely on discrimination prohibited by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[1] A statute which provides different ages of majority for men and women likewise violates the Equal Protection Clause.[2] Also, the Equal Protection Clause is violated by a statute which declares life insurance policies made for the benefit of married women to be their separate property while making no similar provision for married men.[3]

Citizenship.

A statute which grants citizenship to foreign-born offspring of male American citizens who have married abroad, but which denies citizenship to foreign-born offspring of female American citizens who have married abroad, violates the Equal Protection Clause.[4] On the other hand, an additional proof-of-paternity requirement imposed for citizenship by birth whenever the citizen-parent of a child who is born out of wedlock and abroad is the child's father, as opposed to the mother, does not represent

an unconstitutional denial of equal protection based on the sex of the citizen parent.[5] The desire to promote early ties to United States citizen relatives, as well as the recognition that mothers and fathers of out-of-wedlock children are not similarly situated, support the requirement that, whenever the citizen-parent is the father, the child be legitimated, that the father formally acknowledge his paternity, or that the father's paternity be established by a competent court prior to the child's majority.[6]

CUMULATIVE SUPPLEMENT

Cases:

Son had third-party standing to bring equal protection challenge to gender-based differential created by statutes governing acquisition of United States citizenship by child born abroad to one parent who was United States citizen and another parent who was citizen of another nation, on ground of gender-based discrimination against his father, since father had ability to pass citizenship onto son, and father's failure to assert claim in his own right stemmed from disability, not disinterest, due to father's death years before current controversy arose. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 301(a)(7), 8 U.S.C.A. § 1401(a)(7) (1958 ed.); Immigration and Nationality Act, § 309(a, c), 8 U.S.C.A. § 1409(a, c). Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Reed v. Reed, 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed. 2d 225 (1971).

2 Idaho—Harrigfeld v. District Court of Seventh Judicial Dist. In and For Freemont County, 95 Idaho 540, 511 P.2d 822 (1973).
Ill.—Jeschke v. Ruhlow, 59 Ill. App. 3d 125, 17 Ill. Dec. 122, 376 N.E.2d 15 (1st Dist. 1978).
N.Y.—Berger v. Adornato, 76 Misc. 2d 122, 350 N.Y.S.2d 520 (Sup 1973).

3 Idaho—Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust, 147 Idaho 117, 206 P.3d 481 (2009).

4 U.S.—Wauchope v. U.S. Dept. of State, 985 F.2d 1407 (9th Cir. 1993); Aguayo v. Christopher, 865 F. Supp. 479 (N.D. Ill. 1994).

5 U.S.—Miller v. Albright, 523 U.S. 420, 118 S. Ct. 1428, 140 L. Ed. 2d 575 (1998).
Under Fifth Amendment
A statute making it more difficult for a child born abroad and out of wedlock to one United States parent to claim citizenship through that parent if the citizen-parent was the father did not violate the equal protection guarantee of the Fifth Amendment; the additional requirements that the statute imposed upon children born to citizen-fathers were substantially related to the important government objectives of ensuring reliable proof of a biological relationship between the citizen-parent and the child and ensuring that the child and parent had an opportunity to develop real, every day ties.
U.S.—Tuan Anh Nguyen v. I.N.S., 533 U.S. 53, 121 S. Ct. 2053, 150 L. Ed. 2d 115, 178 A.L.R. Fed. 587 (2001).

6 U.S.—Miller v. Albright, 523 U.S. 420, 118 S. Ct. 1428, 140 L. Ed. 2d 575 (1998).

16B C.J.S. Constitutional Law § 1312

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

B. Gender-Based Discrimination

3. Equal Rights Amendments

§ 1312. Equal rights amendments, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3380

A state may expressly forbid gender-based discrimination by a constitutional equal rights amendment providing that equality of rights and responsibility under the law may not be denied or abridged on account of sex.

A state may expressly forbid gender-based discrimination by a constitutional equal rights amendment providing that equality of rights and responsibility under the law may not be denied or abridged on account of sex.[1] The thrust of an equal rights amendment is to insure equality of rights under the law and to eliminate sex as a basis for distinction[2] except when the distinction is genuinely based on physical characteristics unique to one sex.[3] The purpose of such a constitutional provision thus may be stated as being to end discriminatory treatment on account of sex,[4] to guarantee rights for females equal to those of males,[5] to provide legal protection as between men and women,[6] or to end special treatment for or discrimination against either sex.[7] Thus, sex may no longer be accepted as an exclusive classifying tool.[8] If equal treatment is restricted or denied on the basis of sex, the classification is discriminatory and, thus, violates the equal rights amendment of the state constitution.[9]

The force of an equal rights amendment is not confined to the matter of individual rights in the sense of entitlements but equally extends to the elimination of discrimination with respect to burdens and obligations under the law.[10] Accordingly, such an amendment requires equal responsibilities as well as equal rights[11] and does not permit special exemptions or exceptions because of sex.[12]

Judicial scrutiny.

The protections provided by a state equal rights amendment may go beyond those provided by the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[13] Under an equal rights amendment, if equality is restricted or denied on the basis of sex, the classification is discriminatory,[14] and state-sanctioned, sex-based classifications are suspect.[15] Thus, a statutory classification based on sex may be subject to strict judicial scrutiny under a state equal rights amendment,[16] in which case the classification will be upheld only if a compelling interest justifies it and if the impact of the classification is limited as narrowly as possible consistent with its proper purpose.[17]

Employment discrimination.

A statute which favors one sex in employment practices is inconsistent with a state equal rights amendment.[18]

Student participation in athletic events.

A school athletic association rule prohibiting females from participating with males,[19] or males from participating with females,[20] in interscholastic athletic programs may violate a state equal rights amendment.

Constitution of juries.

Gender-based peremptory challenges are impermissible under a state's equal rights amendment because such challenges deny a female venire person's equal rights and responsibilities on the basis of gender.[21]

Footnotes

1 Mass.—Lowell v. Kowalski, 380 Mass. 663, 405 N.E.2d 135 (1980).
N.H.—Buckner v. Buckner, 120 N.H. 402, 415 A.2d 871 (1980).
Tex.—Miller v. Whittlesey, 562 S.W.2d 904 (Tex. Civ. App. Tyler 1978), writ granted, (May 24, 1978) and judgment aff'd, 572 S.W.2d 665 (Tex. 1978).

2 U.S.—Beattie v. Line Mountain School Dist., 992 F. Supp. 2d 384, 306 Ed. Law Rep. 345 (M.D. Pa. 2014) (Pennsylvania Equal Rights Amendment).
Pa.—Henderson v. Henderson, 458 Pa. 97, 327 A.2d 60 (1974).
Sex is not to be a factor
Md.—Rand v. Rand, 280 Md. 508, 374 A.2d 900, 90 A.L.R.3d 150 (1977).

3 U.S.—Beattie v. Line Mountain School Dist., 992 F. Supp. 2d 384, 306 Ed. Law Rep. 345 (M.D. Pa. 2014) (Pennsylvania Equal Rights Amendment).

4 Pa.—Com. v. Butler, 458 Pa. 289, 328 A.2d 851 (1974).
Eliminate discrimination as between men and women as a class
Md.—Conaway v. Deane, 401 Md. 219, 932 A.2d 571 (2007), opinion extended on other grounds after remand, 2008 WL 3999843 (Md. Cir. Ct. 2008).

5 Ill.—People v. Ellis, 57 Ill. 2d 127, 311 N.E.2d 98 (1974).

6 Wash.—Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (Div. 1 1974).

7 Wash.—Marchioro v. Chaney, 90 Wash. 2d 298, 582 P.2d 487 (1978), judgment aff'd, 442 U.S. 191, 99 S. Ct. 2243, 60 L. Ed. 2d 816 (1979).

Equality of rights under law mandated

Md.—Giffin v. Crane, 351 Md. 133, 716 A.2d 1029 (1998).

Statutes treating husbands less favorably than wives

A construction of state statutes which treats husbands less favorably than wives is invalid under a state constitutional provision prohibiting sex discrimination.

N.H.—Buckner v. Buckner, 120 N.H. 402, 415 A.2d 871 (1980).

8 Pa.—Com. v. Butler, 458 Pa. 289, 328 A.2d 851 (1974).

9 Wash.—Rhoades v. Department of Labor and Industries, 143 Wash. App. 832, 181 P.3d 843 (Div. 3 2008).

10 Pa.—Hartford Acc. and Indem. Co. v. Insurance Com'r of Com. of Pa., 65 Pa. Commw. 249, 442 A.2d 382 (1982), order aff'd, 505 Pa. 571, 482 A.2d 542 (1984).

11 Wash.—Smith v. Smith, 13 Wash. App. 381, 534 P.2d 1033 (Div. 1 1975).

Equality of benefits and burdens

The state equal rights amendment generally invalidates governmental action which imposes a burden on, or grants a benefit to, one sex but not the other.

Md.—Giffin v. Crane, 351 Md. 133, 716 A.2d 1029 (1998).

12 Wash.—Marchioro v. Chaney, 90 Wash. 2d 298, 582 P.2d 487 (1978), judgment aff'd, 442 U.S. 191, 99 S. Ct. 2243, 60 L. Ed. 2d 816 (1979).

Modification of common law

The equal rights amendment has modified the common law to such an extent that it would be improper to deny a cause of action based upon the sex of the party bringing the action.

Tex.—Miller v. Whittlesey, 562 S.W.2d 904 (Tex. Civ. App. Tyler 1978), writ granted, (May 24, 1978) and judgment aff'd, 572 S.W.2d 665 (Tex. 1978).

13 Wash.—State v. Brayman, 110 Wash. 2d 183, 751 P.2d 294 (1988).

As to judicial scrutiny under the Equal Protection Clause of the United States Constitution, see §§ 1275 to 1279.

14 Wash.—State v. Brayman, 110 Wash. 2d 183, 751 P.2d 294 (1988).

15 Md.—Giffin v. Crane, 351 Md. 133, 716 A.2d 1029 (1998).

16 Md.—Conaway v. Deane, 401 Md. 219, 932 A.2d 571 (2007), opinion extended on other grounds after remand, 2008 WL 3999843 (Md. Cir. Ct. 2008).

Mass.—Lowell v. Kowalski, 380 Mass. 663, 405 N.E.2d 135 (1980).

Presumption arising from gender-based classifications

The presumption that gender-based classifications violate the state equal rights amendment is not irrebuttable, and the court's heightened scrutiny need not be fatal in fact.

N.M.—New Mexico Right to Choose/NARAL v. Johnson, 1999-NMSC-005, 126 N.M. 788, 975 P.2d 841 (1998).

17 Mass.—Lowell v. Kowalski, 380 Mass. 663, 405 N.E.2d 135 (1980).

Classifications based on unique ability of women to become pregnant

Classifications based on the unique ability of women to become pregnant and bear children are not exempt from a searching judicial inquiry under the state equal rights amendment, and the state constitution requires the state to provide a compelling justification for using such classifications to the disadvantage of the persons they classify.

N.M.—New Mexico Right to Choose/NARAL v. Johnson, 1999-NMSC-005, 126 N.M. 788, 975 P.2d 841 (1998).

18 Tex.—Vick v. Pioneer Oil Co., Western Division, 569 S.W.2d 631 (Tex. Civ. App. Amarillo 1978).

As to violations of the constitutional guarantee of equal protection with respect to employment, generally, see § 1308.

19 Wash.—Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975).

20 Mass.—Attorney General v. Massachusetts Interscholastic Athletic Ass'n, Inc., 378 Mass. 342, 393 N.E.2d 284 (1979).

As to violations of the constitutional guarantee of equal protection with respect to interscholastic sports, see § 1303.

21 Wash.—State v. Burch, 65 Wash. App. 828, 830 P.2d 357 (Div. 1 1992).

As to violations of the constitutional guarantee of equal protection with respect to the constitution of juries, see § 1307.

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

B. Gender-Based Discrimination

3. Equal Rights Amendments

§ 1313. Scope and limits of equal rights amendments

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3380

An individual is afforded no protection under an equal rights amendment unless he or she first demonstrates that a right or responsibility has been denied solely because of that individual's sex, and a constitutional guarantee of equal rights does not prohibit all legal differentiations which might be made among males and females.

An individual is afforded no protection under an equal rights amendment unless he or she first demonstrates that a right or responsibility has been denied solely because of that individual's sex.[1] Such an amendment does not create any new rights or responsibilities but merely insures that existing rights and responsibilities, or such rights and responsibilities as might be created in the future which previously might have been wholly or partially denied to one sex or to the other, will be equally available to members of either sex.[2] If a statute treats all persons alike, regardless of sex, it does not violate a constitutional guarantee of equal rights.[3]

Furthermore, an equal rights amendment does not prohibit all legal differentiations which might be made among males and females.[4] A statutory classification based upon sex may be valid if it is required by physical characteristics unique to one sex;[5] by other constitutionally protected rights, such as the right of privacy;[6] or by other compelling reasons.[7]

Footnotes

1 Wash.—State v. Wood, 89 Wash. 2d 97, 569 P.2d 1148 (1977).

2 Wash.—Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (Div. 1 1974).

3 N.M.—State v. Sandoval, 98 N.M. 417, 1982-NMCA-091, 649 P.2d 485 (Ct. App. 1982).

4 Wash.—Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (Div. 1 1974).

5 Haw.—Holdman v. Olim, 59 Haw. 346, 581 P.2d 1164 (1978).
N.Y.—People v. Prainito, 97 Misc. 2d 66, 410 N.Y.S.2d 772 (Sup 1978).
Tex.—Mercer v. Board of Trustees, North Forest Independent School Dist., 538 S.W.2d 201 (Tex. Civ. App. Houston 14th Dist. 1976), writ refused n.r.e., (Oct. 6, 1976).

6 Tex.—Vick v. Pioneer Oil Co., Western Division, 569 S.W.2d 631 (Tex. Civ. App. Amarillo 1978).

7 Tex.—Vick v. Pioneer Oil Co., Western Division, 569 S.W.2d 631 (Tex. Civ. App. Amarillo 1978).

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

B. Gender-Based Discrimination

3. Equal Rights Amendments

§ 1314. State action "under the law" as factor in construing equal rights amendments

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3380

A cause of action for sex discrimination under an equal rights amendment typically requires that the action alleged to be discriminatory have occurred "under the law," which covers all actions of governmental entities.

A cause of action for sex discrimination under an equal rights amendment typically requires that the action alleged to be discriminatory have occurred "under the law."[1] The phrase "under the law" covers all actions of governmental entities, and the applicability of an equal rights amendment is not limited to only those cases involving sex discrimination by virtue of statute, ordinance, or official policy.[2]

An equal rights amendment does not proscribe purely private sex discrimination.[3] Such a constitutional provision requires that the discrimination complained of be state action or private conduct that is encouraged or enabled by, or closely interrelated in function with, state action.[4]

Footnotes

1 Tex.—Lincoln v. Mid-Cities Pee Wee Football Ass'n, 576 S.W.2d 922 (Tex. Civ. App. Fort Worth 1979).

2 Tex.—Lincoln v. Mid-Cities Pee Wee Football Ass'n, 576 S.W.2d 922 (Tex. Civ. App. Fort Worth 1979).

3 Tex.—Lincoln v. Mid-Cities Pee Wee Football Ass'n, 576 S.W.2d 922 (Tex. Civ. App. Fort Worth 1979).

4 Tex.—Lincoln v. Mid-Cities Pee Wee Football Ass'n, 576 S.W.2d 922 (Tex. Civ. App. Fort Worth 1979).

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B. Gender-Based Discrimination

3. Equal Rights Amendments

§ 1315. Domestic relations matters and equal rights amendments

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3409 to 3412

A state equal rights amendment admits of no exception for rights in the area of domestic relations, and the application of such an amendment to the rights and duties of a man or woman after they become married is not precluded because interests of children of the marriage may be affected.

A state equal rights amendment admits of no exception for rights in the area of domestic relations,[1] and the application of such an amendment to the rights and duties of a man or woman after they become married is not precluded because interests of children of the marriage may be affected.[2]

A judicial classification, providing that a husband may claim damages from loss of consortium but a wife may not, violates a state's equal rights amendment.[3] Likewise, a statute providing that, in the case of a child born out of wedlock, the consent to adoption of the mother only is necessary creates an impermissible distinction between unwed mothers and unwed fathers in violation of an equal rights amendment.[4] Moreover, a statutory provision allowing the payment of alimony pendente lite, counsel fees, and expenses to the wife in a divorce action, but not to the husband, is invalid as violative of an equal rights amendment.[5]

On the other hand, an equal rights amendment does not necessarily abolish common law alimony,[6] and statutes regulating alimony are not unconstitutional in light of such an amendment.[7] Permitting the nurturing parent to remain at home until the child matures does not run afoul of an equal rights amendment.[8]

Support obligations.

Just as it is appropriate for the law, where necessary, to force a man to provide for the needs of his dependent wife, the law must also, consonant with an equal rights amendment, provide a remedy for the man where circumstances justify an entry of support against his wife.[9] A law providing that a husband has a legal duty to supply his wife with necessaries suitable to their station in life, but that a wife has no corresponding obligation to support her husband, is invalid under an equal rights amendment.[10]

Divorce under Islamic religious law.

A state court has refused to recognize a divorce that a husband obtained under Islamic religious law and secular Pakistan law, by performing talaq, because the foreign talaq divorce provision was contrary to state public policy, in that only a husband had an independent right to utilize talaq and a wife could utilize it only with the husband's permission, which was contrary to the state's Equal Rights Amendment.[11]

CUMULATIVE SUPPLEMENT

Cases:

Under the once entrenched principle of male dominance in marriage, the husband controlled both wife and child, but, under equal protection principles, this principle no longer guides the Supreme Court's jurisprudence. U.S.C.A. Const.Amend. 5. Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).

Under equal protection principles, no important governmental interest is served by laws grounded in the obsolescing view that unwed fathers are invariably less qualified and entitled than mothers to take responsibility for nonmarital children; overbroad generalizations of that order have a constraining impact, descriptive though they may be of the way many people still order their lives. U.S.C.A. Const.Amend. 5. Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).

[END OF SUPPLEMENT]

Footnotes

1 Pa.—Kaper v. Kaper, 227 Pa. Super. 377, 323 A.2d 222 (1974).

2 Pa.—George v. George, 487 Pa. 133, 409 A.2d 1 (1979).
Rights of biological fathers protected
Tex.—Odoms v. Batts, 791 S.W.2d 677 (Tex. App. San Antonio 1990).
Legitimation of children
(1) A gender-based distinction contained in a statutory scheme relative to legitimation by fathers of their illegitimate children constitutes discrimination violative of the state equal rights amendment because the State's interest in protecting the welfare of children born out of wedlock can be protected without discriminating solely on the basis of sex.
Tex.—In Interest of McLean, 725 S.W.2d 696 (Tex. 1987).

(2) Under an Equal Rights Amendment, paternity statutes apply equally to both males and females, and thus, the process by which males can challenge paternity can also be employed by females to challenge maternity.
Md.—In re Roberto d.B., 399 Md. 267, 923 A.2d 115 (2007).

3 Wash.—Lundgren v. Whitney's, Inc., 94 Wash. 2d 91, 614 P.2d 1272 (1980).

4 Pa.—Adoption of Walker, 468 Pa. 165, 360 A.2d 603 (1976).

Presumption with respect to child custody

The "tender years" presumption to the effect that the natural mother of a young child is entitled to custody unless compelling reasons to the contrary are presented by the father conflicts with the equal rights amendment.
Pa.—Com. ex rel. Weber v. Weber, 272 Pa. Super. 88, 414 A.2d 682 (1979).

5 Pa.—Henderson v. Henderson, 458 Pa. 97, 327 A.2d 60 (1974).

6 Md.—Hofmann v. Hofmann, 50 Md. App. 240, 437 A.2d 247 (1981).

7 N.M.—Schaab v. Schaab, 1974-NMSC-072, 87 N.M. 220, 531 P.2d 954 (1974).

8 Pa.—Com. ex rel. Wasiolek v. Wasiolek, 251 Pa. Super. 108, 380 A.2d 400 (1977).

9 Pa.—Henderson v. Henderson, 458 Pa. 97, 327 A.2d 60 (1974).

10 Md.—Condore v. Prince George's County, 289 Md. 516, 425 A.2d 1011 (1981).

11 Md.—Aleem v. Aleem, 404 Md. 404, 947 A.2d 489 (2008).

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Research References

A.L.R. Library

A.L.R. Index, Equal Protection
West's A.L.R. Digest, Constitutional Law 3045, 3106, 3227, 3228, 3298, 3340, 3780 to 3782, 3788 to 3790, 3791, 3794 to 3798, 3800, 3803, 3805, 3833

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

1. Criminal Liability

§ 1316. Equal protection guarantee; criminal offenses and prosecutions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3780, 3781

Absent a peculiar disadvantage to a suspect class or interference with the exercise of a fundamental right, a criminal statutory classification is not violative of equal protection when it is reasonable, sufficiently well-defined, and rationally related to a legitimate governmental purpose.

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution fully applies to all penal statutes.[1] The requirements of equal protection of the laws are met if the statute creating and defining a criminal offense lays down a definite, ascertainable standard of guilt; requires an accusation in due form: and operates without discrimination on all persons and classes of persons similarly situated.[2] An act is not unconstitutional as violative of equal protection if the statute has sufficient standards to guard against arbitrary, erratic, and discriminatory arrests, prosecutions, and convictions.[3] On the other hand, a statute violates equal protection if it encourages arbitrary and erratic arrests and convictions.[4]

The proper inquiry, for purposes of the Equal Protection Clause, is whether a statute applies equally to all those accused under it and therefore does not create disparate classifications among similarly situated persons.[5] A defendant's constitutional right to

equal protection of the laws is not violated unless the defendant is treated differently based on an impermissible classification, and if everyone in the same class is treated equally, there is no violation of equal protection.[6]

A state, as a part of its police power, may exercise a large measure of discretion, without violating the equal protection guaranty, in creating and defining criminal offenses.[7]

Statutory classifications.

Absent a peculiar disadvantage to a suspect class or interference with the exercise of a fundamental right, a criminal statutory classification is not violative of equal protection where it is reasonable, sufficiently well defined, and rationally related to a legitimate governmental purpose.[8] Moreover, in order to trigger an equal protection analysis of a criminal statute, a defendant must show he or she received different treatment, as a member of one class, from the treatment accorded members of another class that was similarly situated.[9] The guarantee of equal protection does not require identical treatment as long as the distinctions between classes of people or classes of crimes are not arbitrarily drawn.[10] Thus, for example, a state may make certain acts punishable only when committed by or against a person above or below a specified age.[11]

A statute ordinarily may make classifications as to persons amenable to punishment as long as the classifications are reasonable and the legislation bears equally on all in the same class.[12] However, in criminal cases involving federal constitutional questions where fundamental rights and suspect categories are at issue, a court must apply the strict scrutiny test, in determining whether there is a denial of equal protection, and is bound by the "compelling state interest" standard.[13]

National or state law.

The national government does not violate equal protection when its own body of law is evenhanded, regardless of the law of states with respect to the same subject matter,[14] and the fact that a violation of a federal statute is punishable as a felony while the same conduct may result only in a misdemeanor conviction in state court does not render such a statute violative of equal protection.[15]

Footnotes

1 Cal.—Cotton v. Municipal Court, 59 Cal. App. 3d 601, 130 Cal. Rptr. 876 (4th Dist. 1976).
As to discrimination in criminal matters on the basis of race, ethnicity, or creed, see § 1289.
As to gender-based discrimination in criminal proceedings, generally, see § 1300.

2 N.J.—State v. W. U. Tel. Co., 13 N.J. Super. 172, 80 A.2d 342 (County Ct. 1951).
N.C.—State v. Fulcher, 294 N.C. 503, 243 S.E.2d 338 (1978).
Impermissibility of marital exception
Sexual abuse in the first degree and attempted sexual abuse in the first degree are offenses even if the defendant is married to the victim; a marital exception would violate equal protection.
N.Y.—People v. Horvath, 183 A.D.2d 915, 584 N.Y.S.2d 148 (2d Dep't 1992).

3 U.S.—Atkins v. Clements, 529 F. Supp. 735 (N.D. Tex. 1981).
Equal protection rights not violated
Denial of the mistake-of-age defense to a defendant charged with sexual exploitation of a minor did not violate the defendant's equal protection rights, even though the defense was available to persons charged with dissemination and exhibition of obscene material to minors, in that differences in criminal activity underlying the offenses provided a rational basis for treating those accused of the different offense in a different manner.

Iowa—State v. Gilmour, 522 N.W.2d 595 (Iowa 1994).

4 Wyo.—Moe v. State, 2005 WY 58, 110 P.3d 1206 (Wyo. 2005), on reh'g on other grounds, 2005 WY 149, 123 P.3d 148 (Wyo. 2005).

5 Ga.—Reed v. State, 264 Ga. 466, 448 S.E.2d 189 (1994).

6 Mont.—State v. Tadewaldt, 277 Mont. 261, 922 P.2d 463 (1996).

7 D.C.—U. S. v. Moses, 339 A.2d 46 (D.C. 1975).

Kan.—State v. Thompson, 221 Kan. 165, 558 P.2d 1079 (1976).

Right to equal protection not violated

(1) A prosecutorial decision to seek two murder convictions for the death of a mother and the death of a viable fetus and to allege multiple-murder enhancement, instead of simply seeking an enhanced prison sentence based on pregnancy termination for the mother's death, did not of itself evidence an arbitrary and capricious capital punishment system or offend principles of due process or equal protection or the prohibition of cruel and unusual punishments.

Cal.—People v. Dennis, 17 Cal. 4th 468, 71 Cal. Rptr. 2d 680, 950 P.2d 1035 (1998).

(2) A defendant's equal protection rights were not violated by federal and state prosecutors' combined decision to bring charges under state, rather than federal, law; federal charges of murder in the first degree and attempted murder of a federal officer and state charges of aggravated murder in the first degree and assault in the first degree contained different elements.

Wash.—State v. Hoffman, 116 Wash. 2d 51, 804 P.2d 577 (1991).

Review of wisdom, need, or appropriateness of legislation

In the area of public safety, as in the area of economic regulation, the constitutional guarantee of equal protection does not justify review of the wisdom, need, or appropriateness of legislation.

Mass.—Opinion of the Justices to the House of Representatives, 368 Mass. 824, 333 N.E.2d 385 (1975).

As to the general prohibition against inquiry by the judiciary into the policy, wisdom, or expediency of legislation, see § 426.

8 U.S.—U.S. v. Guerrero, 667 F.2d 862, 9 Fed. R. Evid. Serv. 419, 57 A.L.R. Fed. 2d 703 (10th Cir. 1981).

Ala.—Bristow v. State, 418 So. 2d 927 (Ala. Crim. App. 1982).

Colo.—People v. Caponey, 647 P.2d 668 (Colo. 1982).

Fla.—State v. Yu, 400 So. 2d 762 (Fla. 1981).

As to the rational basis test, generally, see § 1279.

No violation of equal protection shown

Distinctions in an antimask-wearing statute, allowing mask wearing for holidays but prohibiting Ku Klux Klan members from wearing masks, distinguished appropriately between mask wearing that was intimidating and mask wearing for benign purposes and, thus, the statute did not violate the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution.

Ga.—State v. Miller, 260 Ga. 669, 398 S.E.2d 547 (1990).

9 Vt.—State v. George, 157 Vt. 580, 602 A.2d 953 (1991).

10 U.S.—Spears v. Circuit Court, Ninth Judicial Dist., Warren County, State of Miss., 517 F.2d 360 (5th Cir. 1975).

Wash.—State v. Thompson, 88 Wash. 2d 60, 558 P.2d 245 (1977).

Convictions for different crimes

(1) Equal protection does not require persons convicted of different crimes to be treated equally.

Cal.—People v. Preciado, 116 Cal. App. 3d 409, 172 Cal. Rptr. 107 (4th Dist. 1981).

(2) A statute prohibiting possession of a schedule I controlled substance did not violate equal protection because it carried a greater penalty than a statute involving the felony use of a schedule I controlled substance; penalizing possession more harshly than use was justified because one has a capability to distribute or dispense a controlled substance as long as one has possession of it.

Colo.—People v. Cagle, 751 P.2d 614 (Colo. 1988).

Distinction based upon type of victim

(1) A retail-theft statute providing more severe penalties for theft from retail merchants than for theft from other parties furthered an appropriate state interest of protecting merchants who were especially affected by shoplifting and, thus, the statute did not violate the equal protection provisions of the state constitution.

La.—State v. Fleury, 799 So. 2d 468 (La. 2001).

(2) A distinction between commercial and noncommercial bookstores violates equal protection.

Colo.—Tattered Cover, Inc. v. Tooley, 696 P.2d 780 (Colo. 1985).

11 U.S.—Gabree v. King, 614 F.2d 1 (1st Cir. 1980).

N.Y.—People v. Prainito, 97 Misc. 2d 66, 410 N.Y.S.2d 772 (Sup 1978).

N.C.—State v. Elam, 302 N.C. 157, 273 S.E.2d 661 (1981).

As to determination of the status of an accused according to age, see § 1320.

Distinction based on age of murder victim

A distinction in a child capital murder statute between murders of children under six years of age and those of older children did not violate the defendant's equal protection rights but rather was rationally related to the government's interests in protecting young children and expressing society's moral outrage against their murder.

Tex.—Henderson v. State, 962 S.W.2d 544 (Tex. Crim. App. 1997).

12 U.S.—Piepenburg v. Cutler, 507 F. Supp. 1105 (D. Utah 1980), judgment aff'd, 649 F.2d 783 (10th Cir. 1981).

Cal.—In re Sims, 117 Cal. App. 3d 309, 172 Cal. Rptr. 608 (1st Dist. 1981).

Iowa—State v. Conner, 314 N.W.2d 427 (Iowa 1982).

Review under rational basis standard appropriate

(1) Rational basis test applied to equal protection challenge to International Parental Kidnapping Crime Act (IPKCA) by father who alleged that he could be prosecuted under IPKCA only because both child's mother and grandmother enjoyed visitation rights, whereas similarly situated parent who shared visitation rights with only grandmother could not be so prosecuted; thus, even assuming that father and a parent who shared visitation rights only with a grandparent would be similarly situated, government was required to demonstrate only rational basis for disparate treatment.

U.S.—U.S. v. Alahmad, 211 F.3d 538, 55 Fed. R. Evid. Serv. 77 (10th Cir. 2000) (citing 18 U.S.C.A. § 1204).

(2) A "zero tolerance law," making it a crime for anyone under the age of 21 to drive with a blood-alcohol content of 0.02% or higher, would be reviewed under the rational basis standard, for purposes of a claim that the statute violated the equal protection rights of drivers under 21, as the statute did not infringe on a fundamental right or impact a suspect class negatively.

Ky.—Com. v. Howard, 969 S.W.2d 700 (Ky. 1998).

13 Ind.—Hall v. State, 273 Ind. 425, 403 N.E.2d 1382 (1980).

Md.—Neville v. State, 290 Md. 364, 430 A.2d 570 (1981).

Mo.—State v. Horne, 622 S.W.2d 956 (Mo. 1981).

Or.—City of Portland v. Ledwidge, 50 Or. App. 355, 622 P.2d 1150 (1981).

As to the applicability of the strict scrutiny test to statutes containing suspect classifications on the basis of race, ethnicity, or creed, see § 1282.

14 U.S.—U. S. v. Antelope, 430 U.S. 641, 97 S. Ct. 1395, 51 L. Ed. 2d 701 (1977).

15 § 1318.

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16B C.J.S. Constitutional Law § 1317

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

1. Criminal Liability

§ 1317. Equal protection and discriminatory enforcement of criminal law

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3045, 3298, 3340, 3782, 3789

The Fifth and Fourteenth Amendments of the United States Constitution prohibit selective prosecution based on an unjustifiable standard such as race, religion, or other arbitrary classification.

Generally, the government is given broad discretion in selecting whom it will prosecute,[1] and the conscious exercise of some selectivity by prosecuting authorities in the application of a criminal statute is not, in itself, a denial of equal protection.[2] However, the Equal Protection Clause of the Fourteenth Amendment prohibits a decision to prosecute based on an unjustifiable standard such as race, religion, or other arbitrary classification.[3] Likewise, under the equal protection component of the Due Process Clause of the Fifth Amendment, the decision of whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification.[4] On the other hand, where the selective enforcement of criminal statutes is not arbitrary, capricious, or based upon unjustifiable standards, such selective enforcement does not violate the constitutional guarantee of equal protection.[5]

Prosecution for a violation of the criminal laws is not barred by the fact that the authorities normally do not prosecute for such offense.[6] Furthermore, prosecution for a crime is not a violation of equal protection even though other violators who have informed have been granted immunity[7] or been permitted to plead guilty to lesser crimes.[8]

Burden of proof.

A defendant alleging selective prosecution, in violation of the constitutional guarantee of equal protection, must show that the State has not generally prosecuted other similarly situated persons and that the State selected the defendant for prosecution for discriminatory reasons.[9] Stated differently, a plaintiff may establish a selective enforcement claim under the Equal Protection Clause by showing (1) that plaintiff was treated differently from another, similarly situated individual, and (2) that this selective treatment was based on an unjustifiable standard, such as race, or religion, or some other arbitrary factor,[10] or was intended to prevent the exercise of a fundamental right,[11] or was animated by malicious or bad faith intent to injure a person.[12] A defendant also may demonstrate that the administration of a criminal law is directed so exclusively against a particular class of persons with a mind so unequal and oppressive that the system of prosecution amounts to a practical denial of equal protection of the law.[13] In any event, a plaintiff must establish that the challenged decision had a discriminatory effect and that it was motivated by a discriminatory purpose.[14]

It is insufficient to establish a denial of equal protection on the theory of discriminatory enforcement of a statute or municipal ordinance merely to show that other violators have not been prosecuted,[15] that there has been laxity in enforcement,[16] or that there has been a conscious exercise of some selectivity in enforcement.[17] Factors that are probative in determining discriminatory intent, in an action alleging selective enforcement of a law, are evidence of a consistent pattern of actions by the decisionmaking body disparately impacting members of a particular class of persons; the historical background of the decision, which may take into account any history of discrimination by the decisionmaking body or the jurisdiction it represents; the specific sequence of events leading up to the particular decision being challenged, including any significant departures from normal procedures; and contemporary statements by decisionmakers on the record or in minutes of their meetings.[18]

Footnotes

1 U.S.—U.S. v. Duncan, 598 F.2d 839, 4 Fed. R. Evid. Serv. 848 (4th Cir. 1979); U.S. v. Fell, 944 F. Supp. 2d 297 (D. Vt. 2013), for additional opinion, see, 2013 WL 1953322 (D. Vt. 2013).
Idaho—State v. Horn, 101 Idaho 192, 610 P.2d 551 (1980).
Or.—State ex rel. Anderson v. Haas, 43 Or. App. 169, 602 P.2d 346 (1979).
Statute leaving room for exercise of discretion
The fact that a criminal statute leaves room for the exercise of discretion in its enforcement does not alone give rise to a violation of the constitutional guarantee of equal protection.
Or.—State v. Hodgdon, 31 Or. App. 791, 571 P.2d 557 (1977).

2 U.S.—Bordenkircher v. Hayes, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978); U.S. v. Lichenstein, 610 F.2d 1272 (5th Cir. 1980).
Ala.—Williams v. State, 393 So. 2d 492 (Ala. Crim. App. 1981).
Prosecutorial reasons for selectivity
There may be valid prosecutorial reasons for prosecuting a prostitute and not a patron under given circumstances, such as organized commercial prostitution, immunity from prosecution to testify, and others, and thus, a decision to so prosecute does not per se constitute a violation of the Equal Protection Clause.
Wis.—State v. Johnson, 74 Wis. 2d 169, 246 N.W.2d 503 (1976).
Principal and accomplices
It is not a denial of equal protection for a state to prosecute a principal for a crime although his or her accomplices are not charged.

Ill.—People v. Ruiz, 78 Ill. App. 3d 326, 33 Ill. Dec. 590, 396 N.E.2d 1314 (1st Dist. 1979).

3 U.S.—U.S. v. Armstrong, 517 U.S. 456, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996); Jewish Home of Eastern PA v. Centers for Medicare and Medicaid Services, 693 F.3d 359 (3d Cir. 2012).

As to the prohibition against racially discriminatory enforcement of criminal laws, see § 1289.

As to the prohibition against selective enforcement of criminal laws on the basis of gender, see § 1300.

Invidious purpose

An invidious purpose for prosecution, in the equal protection context, is one that is arbitrary and thus unjustified because it bears no rational relationship to legitimate law enforcement interests.

Cal.—Manduley v. Superior Court, 27 Cal. 4th 537, 27 Cal. 4th 887a, 117 Cal. Rptr. 2d 168, 41 P.3d 3 (2002), as modified, (Apr. 17, 2002).

4 U.S.—U.S. v. Smith, 231 F.3d 800, 55 Fed. R. Evid. Serv. 1267 (11th Cir. 2000).

A.L.R. Library

What constitutes such discriminatory prosecution or enforcement of laws as to provide valid defense in federal criminal proceedings, 45 A.L.R. Fed. 732.

5 Fla.—Bell v. State, 369 So. 2d 932 (Fla. 1979).

N.J.—State v. Sutton, 80 N.J. 110, 402 A.2d 230 (1979).

Wis.—Sears v. State, 94 Wis. 2d 128, 287 N.W.2d 785 (1980).

Prosecution of all or none not required

The Federal Constitution does not require a state to chose between prosecuting every individual implicated in unlawful activity or prosecuting none of them; where there is no evidence of class-based or racially motivated discrimination and no governmental policy of nonprosecution, the State has wide latitude in selecting which wrongdoers it will prosecute.

U.S.—Busche v. Burkee, 649 F.2d 509 (7th Cir. 1981).

6 U.S.—U.S. v. Blitstein, 626 F.2d 774 (10th Cir. 1980).

Ky.—Carver v. Com., 634 S.W.2d 418 (Ky. 1982).

Ohio—Maloney v. Maxwell, 174 Ohio St. 84, 21 Ohio Op. 2d 341, 186 N.E.2d 728 (1962).

7 U.S.—Brown v. Parratt, 419 F. Supp. 44 (D. Neb. 1976), judgment aff'd, 560 F.2d 303 (8th Cir. 1977).

Ohio—State v. Wolery, 46 Ohio St. 2d 316, 75 Ohio Op. 2d 366, 348 N.E.2d 351 (1976).

Or.—State v. Clark, 291 Or. 231, 630 P.2d 810 (1981).

8 U.S.—Brown v. Parratt, 419 F. Supp. 44 (D. Neb. 1976), judgment aff'd, 560 F.2d 303 (8th Cir. 1977).

Colo.—People v. MacFarland, 189 Colo. 363, 540 P.2d 1073 (1975).

Ill.—People v. Golz, 53 Ill. App. 3d 654, 11 Ill. Dec. 461, 368 N.E.2d 1069 (2d Dist. 1977).

9 N.D.—McMorrow v. State, 2003 ND 134, 667 N.W.2d 577 (N.D. 2003).

10 U.S.—Cine SK8, Inc. v. Town of Henrietta, 507 F.3d 778 (2d Cir. 2007); Jewish Home of Eastern PA v. Centers for Medicare and Medicaid Services, 693 F.3d 359 (3d Cir. 2012); Febus-Cruz v. Sauri-Santiago, 652 F. Supp. 2d 140 (D.P.R. 2009).

Arbitrary and capricious.

D.C.—Hospitality Temps Corp. v. District of Columbia, 926 A.2d 131 (D.C. 2007).

11 U.S.—Jewish Home of Eastern PA v. Centers for Medicare and Medicaid Services, 693 F.3d 359 (3d Cir. 2012).

Constitutional rights

U.S.—Cine SK8, Inc. v. Town of Henrietta, 507 F.3d 778 (2d Cir. 2007); Febus-Cruz v. Sauri-Santiago, 652 F. Supp. 2d 140 (D.P.R. 2009).

12 U.S.—Ginorio v. Contreras, 409 F. Supp. 2d 101 (D.P.R. 2006), aff'd, 490 F.3d 31 (1st Cir. 2007).

13 U.S.—U.S. v. Armstrong, 517 U.S. 456, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996).

Application of general rules in discriminatory manner

U.S.—Jones v. Helms, 452 U.S. 412, 101 S. Ct. 2434, 69 L. Ed. 2d 118 (1981).

Discriminatory effect on identifiable group

To prevail on a claim of selective enforcement of traffic laws under equal protection principles, defendants must prove that the officer's decision to stop their vehicle or the officer's conduct during the challenged traffic stop was motivated by a discriminatory purpose and had a discriminatory effect on the identifiable group to which the defendants belong.

U.S.—U.S. v. Hare, 308 F. Supp. 2d 955 (D. Neb. 2004).

14 Me.—Polk v. Town of Lubec, 2000 ME 152, 756 A.2d 510 (Me. 2000).

Intentional and consistent pattern of discrimination

Equal protection of the laws may be violated by an intentional or purposeful, consistent pattern of discrimination in the enforcement and application of a criminal statute.

U.S.—Cox v. State of La., 379 U.S. 536, 85 S. Ct. 453, 13 L. Ed. 2d 471 (1965).

Use of statistics to show discriminatory effect

Although statistics alone rarely establish an equal protection violation, they may be sufficient to establish the discriminatory effect prong of the test used to determine if discovery should be allowed on a selective enforcement or selective prosecution claim under *Armstrong*, but such statistics must be relevant and reliable.

U.S.—U.S. v. Barlow, 310 F.3d 1007 (7th Cir. 2002).

15 U.S.—U.S. v. Blitstein, 626 F.2d 774 (10th Cir. 1980).

Ala.—DeShazo v. City of Huntsville, 416 So. 2d 1100 (Ala. Crim. App. 1982).

Or.—City of Eugene v. Crooks, 55 Or. App. 351, 637 P.2d 1350 (1981).

Pa.—Pyle v. Court of Common Pleas of Cumberland County, 494 Pa. 323, 431 A.2d 876 (1981).

16 Ala.—DeShazo v. City of Huntsville, 416 So. 2d 1100 (Ala. Crim. App. 1982).

Cal.—People v. Tuck, 204 Cal. App. 4th 724, 139 Cal. Rptr. 3d 407 (1st Dist. 2012).

17 Ala.—DeShazo v. City of Huntsville, 416 So. 2d 1100 (Ala. Crim. App. 1982).

N.C.—State v. Spicer, 299 N.C. 309, 261 S.E.2d 893 (1980).

Decision to seek death penalty

Where a defendant showed only that a district attorney decided not to seek the death penalty in various cases involving other defendants, victims, witnesses, and facts, the defendant was not denied equal protection because the district attorney sought the death penalty in his case since it is presumed that a district attorney's decisions, absent a persuasive showing to the contrary, are legitimately founded on complex considerations necessary for the administration of law enforcement.

Cal.—People v. Haskett, 30 Cal. 3d 841, 180 Cal. Rptr. 640, 640 P.2d 776 (1982).

18 U.S.—Central Radio Co. Inc. v. City of Norfolk, Virginia, 776 F.3d 229 (4th Cir. 2015).

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16B C.J.S. Constitutional Law § 1318

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

1. Criminal Liability

§ 1318. Equal protection and discriminatory enforcement of criminal law—Choice of statutory provision

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3045, 3298, 3340, 3782, 3789

Prosecutorial discretion to choose which of two or more statutory provisions proscribing the same conduct will form the basis of a prosecution is not a denial of equal protection, notwithstanding the provisions contain differing penalties, so long as the provisions require proof of different elements.

Prosecutorial discretion to choose which of two or more statutory provisions proscribing the same conduct will form the basis of a prosecution is not a denial of equal protection, even if the provisions contain differing penalties,[1] so long as the provisions require proof of different elements.[2] The rights of accused to equal protection are not violated by the exercise of prosecutorial discretion to charge the designated statutory offense or to select only an underlying crime.[3]

Where conduct is proscribed by two or more separate criminal statutes, equal protection is not denied when the government fails to elect to prosecute under the statute imposing the greatest burden of proof.[4]

Felony or misdemeanor.

The mere fact that an accused can be charged with either a felony or misdemeanor does not violate the constitutional guarantee of equal protection so long as the elements necessary to prove the felony and the misdemeanor are different.[5] However, where the same act under the same circumstances is punishable either as a felony or a misdemeanor, under either of two statutory provisions, and the elements of proof essential to either are exactly the same, conviction under the felony statute violates equal protection.[6] Nonetheless, the fact that an accused is charged with a felony and a misdemeanor, as a result of the same conduct, is not violative of equal protection.[7]

Specific and general statute.

Where there are two laws covering the same act, one being general and the other specific, it is not a denial of equal protection to prosecute the defendant under the special statute.[8]

Footnotes

1 Ariz.—State v. Romero, 130 Ariz. 142, 634 P.2d 954 (1981).
Ark.—Miller v. State, 273 Ark. 508, 621 S.W.2d 482 (1981).
Or.—City of Klamath Falls v. Winters, 289 Or. 757, 619 P.2d 217 (1980).
As to the applicability of equal protection to punishment for criminal offenses, generally, see § 1352.
Different recognizable classes
Equal protection, under two overlapping statutes which carry differing penalties, requires only that the two statutes are not utilized to treat different recognizable classes differently.
Ind.—Comer v. State, 428 N.E.2d 48 (Ind. Ct. App. 1981).

2 Colo.—People v. Clanton, 2015 COA 8, 2015 WL 795014 (Colo. App. 2015).
Fla.—McCrae v. State, 395 So. 2d 1145 (Fla. 1980).
Wash.—State v. Armstrong, 143 Wash. App. 333, 178 P.3d 1048 (Div. 1 2008).
Wis.—Mack v. State, 93 Wis. 2d 287, 286 N.W.2d 563 (1980).
No violation absent discrimination against any class of individuals
The commonwealth's discretion to choose between two statutes when prosecuting an individual does not violate the constitutional guarantees of due process and equal protection so long as the exercise of that discretion does not discriminate against any class of individuals.
Mass.—Com. v. Hudson, 404 Mass. 282, 535 N.E.2d 208 (1989).

3 U.S.—U.S. v. Aleman, 609 F.2d 298 (7th Cir. 1979).
Mich.—People v. Benjamin, 101 Mich. App. 637, 300 N.W.2d 661 (1980).
N.Y.—People v. Gillis, 67 A.D.2d 1008, 413 N.Y.S.2d 747 (2d Dep't 1979).
As to prosecutorial discretion in criminal enforcement, see § 1317.

4 U.S.—U.S. v. Ruggiero, 472 F.2d 599 (2d Cir. 1973); U.S. v. Devitt, 499 F.2d 135 (7th Cir. 1974); U.S. v. Koonce, 485 F.2d 374 (8th Cir. 1973).

5 Haw.—State v. Martin, 62 Haw. 364, 616 P.2d 193 (1980).
Utah—State v. Clark, 632 P.2d 841 (Utah 1981).
Wash.—State v. Williams, 29 Wash. App. 86, 627 P.2d 581 (Div. 3 1981).
Federal or state law
The fact that a violation of a federal statute is punishable as a felony, while the same conduct may result only in a misdemeanor conviction in state court, does not render such a statute violative of equal protection.
U.S.—U.S. v. Kerrigan, 514 F.2d 35 (9th Cir. 1975).

6 Haw.—State v. Kuuku, 61 Haw. 79, 595 P.2d 291 (1979).
Wash.—State v. Gibson, 16 Wash. App. 119, 553 P.2d 131 (Div. 1 1976).
Wis.—State v. Asfoor, 75 Wis. 2d 411, 249 N.W.2d 529 (1977).

7 Ill.—People v. Cannes, 61 Ill. App. 3d 865, 19 Ill. Dec. 51, 378 N.E.2d 552 (2d Dist. 1978).

8 N.M.—Campion v. State, 84 N.M. 137, 1972-NMCA-111, 500 P.2d 422 (Ct. App. 1972).

Two applicable statutes

In the exercise of constitutionally permissible prosecutional discretion, the State may decide which of two applicable statutes will be used.

Or.—State v. Hodgdon, 31 Or. App. 791, 571 P.2d 557 (1977).

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16B C.J.S. Constitutional Law § 1319

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

2. Criminal Proceedings

§ 1319. Equal protection in criminal proceedings, generally

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3780, 3803

In the context of a criminal proceeding, equal protection does not require absolute equality or precisely equal advantages but requires an adequate opportunity to present one's claim fairly without arbitrary or invidious discrimination.

Every person involved in a criminal proceeding is entitled to the full protection of equal protection of the laws fundamental to a fair trial, particularly when life or liberty is involved.[1] However, in the context of a criminal proceeding, equal protection does not require absolute equality or precisely equal advantages but requires only an adequate opportunity to present one's claim fairly without arbitrary or invidious discrimination.[2] Thus, different treatment, without more, creates no issue of violation of equal protection.[3]

Equal protection of the laws includes the right to be tried in the same manner as others accused of a crime are tried.[4] Thus, a statute relating to criminal procedure is void as a denial of the constitutional right to equal protection if it prescribes a different procedure in the case of persons in similar situations.[5] Subject to the foregoing limitation, however, the legislature has a large

measure of discretion in prescribing the modes of criminal procedure,[6] and may adapt particular methods of procedure to particular classes of cases,[7] or courts.[8]

The legislature may determine that enumerated offenses do not necessarily affect persons in a similar situation so that persons of a certain character may be dealt with under a different procedure from that applied to persons of another character for the same offense.[9] Particular methods not allowed to be used against individuals may be authorized to be used in the enforcement of criminal laws against corporations.[10] The legislature generally may also prescribe different methods of procedure in different parts of the state.[11]

Criminal defendants are similarly situated for purposes of equal protection only if they are charged with the same crime or crimes.[12]

Prosecutor.

The fact that a criminal defendant is not prosecuted by an independent, professional prosecutor, while other persons charged with the same crime are prosecuted by attorneys, is not a denial of equal protection.[13] A defendant is not deprived of equal protection by virtue of prosecutorial advantages allegedly possessed by a career criminal unit in a district attorney's office, including its reception of federal finances.[14]

Experimental programs.

Equal protection considerations will not preclude the legislative branch from prescribing experimental programs related to criminal charges or convictions.[15]

CUMULATIVE SUPPLEMENT

Cases:

Municipality's assurance that police surveillance of persons associated with Islam was justified by national-security and public-safety concerns did not satisfy its burden of producing evidence to overcome heightened scrutiny's presumption of violation of equal protection. U.S.C.A. Const.Amend. 14. Hassan v. City of New York, 804 F.3d 277 (3d Cir. 2015).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Stump v. Bennett, 398 F.2d 111 (8th Cir. 1968).
White collar crime
The United States Constitution does not afford greater equal protection rights to persons involved in white collar crime or persons who have the financial resources and opportunity to secure psychiatric treatment from well-credentialed private psychiatrists.
Kan.—Application of Jones, 228 Kan. 90, 612 P.2d 1211 (1980).
Duplicative federal and state prosecutions
An accused is not denied equal protection by reason of the fact that, subsequent to prosecution in federal court, he or she is subjected to a state prosecution for the same offense, notwithstanding a claim that

the United States Department of Justice violated a self-imposed policy against duplicative federal-state prosecutions, where the federal authorities were in no position to invoke their policy of avoiding duplication, in that the state authorities were not bound by the policy of the Justice Department.

U.S.—Sappington v. U.S., 523 F.2d 858 (8th Cir. 1975).

2 U.S.—U. S. v. MacCollom, 426 U.S. 317, 96 S. Ct. 2086, 48 L. Ed. 2d 666 (1976).

Aberrational implementation

Aberrational implementation of proper criminal procedures does not give rise to an equal protection claim absent a showing of intentional or purposeful discrimination.

U.S.—U.S. v. Doe, 401 F. Supp. 63 (E.D. Wis. 1975).

Prosecution without exhausting administrative remedies

It is not a denial of equal protection to prosecute without exhausting administrative remedies.

Fla.—State v. Babun, 233 So. 2d 171 (Fla. 3d DCA 1970).

3 D.C.—District of Columbia v. P.L.M., 325 A.2d 600 (D.C. 1974).

4 U.S.—Lynch v. U.S., 189 F.2d 476 (5th Cir. 1951).

Mont.—McKenzie v. Osborne, 195 Mont. 26, 640 P.2d 368 (1981).

5 Fla.—State ex rel. Gerstein v. Hialeah Race Course, Inc., 245 So. 2d 53 (Fla. 1971).

N.Y.—Commissioner of Public Welfare of City of New York ex rel. Martinez v. Torres, 263 A.D. 19, 31 N.Y.S.2d 101 (1st Dep't 1941).

6 Fla.—Daniels v. O'Connor, 243 So. 2d 144 (Fla. 1971).

Ind.—State ex rel. Mavity v. Tyndall, 225 Ind. 360, 74 N.E.2d 914 (1947).

Ohio—State ex rel. Eikenbary v. Smith, 54 Ohio L. Abs. 253, 87 N.E.2d 590 (Ct. App. 2d Dist. Montgomery County 1948).

7 Fla.—State v. Dreyer, 265 So. 2d 367 (Fla. 1972); Dean v. State, 265 So. 2d 15 (Fla. 1972).

Ill.—People v. Menke, 74 Ill. App. 3d 220, 28 Ill. Dec. 274, 390 N.E.2d 441 (5th Dist. 1979).

Kan.—State v. Bell, 205 Kan. 380, 469 P.2d 448 (1970).

Trial in absentia

The distinction between felonies and misdemeanors was a valid basis for a criminal rule authorizing the trial of misdemeanor cases in absentia when the defendant has waived the right to be present, but forbidding such a trial in felony cases, and the rule does not violate equal protection.

Ky.—McKinney v. Com., 474 S.W.2d 384 (Ky. 1971).

8 Cal.—People v. Baltor, 77 Cal. App. 3d 227, 143 Cal. Rptr. 478 (2d Dist. 1978).

Kan.—State v. Boone, 218 Kan. 482, 543 P.2d 945 (1975).

9 N.Y.—People v. Peterson, 91 Misc. 2d 407, 398 N.Y.S.2d 24 (Sup 1977).

Ohio—State v. Lamp, 59 Ohio App. 2d 125, 13 Ohio Op. 3d 173, 392 N.E.2d 1090 (9th Dist. Summit County 1977).

Or.—State v. Stilling, 31 Or. App. 703, 571 P.2d 184 (1977), judgment aff'd, 285 Or. 293, 590 P.2d 1223 (1979).

Nontrafficking addicts

U.S.—U.S. v. Leazer, 460 F.2d 864 (D.C. Cir. 1972).

10 U.S.—Standard Oil Co. of Kentucky v. State of Tennessee ex rel. Cates, 217 U.S. 413, 30 S. Ct. 543, 54 L. Ed. 817 (1910).

11 Mich.—Walber v. Piggins, 381 Mich. 138, 160 N.W.2d 876 (1968).

Mo.—Morton v. State, 468 S.W.2d 638 (Mo. 1971).

Expedition of pretrial procedures in particular county

Iowa—Iowa Civil Liberties Union v. Critelli, 244 N.W.2d 564 (Iowa 1976).

12 Ga.—Drew v. State, 285 Ga. 848, 684 S.E.2d 608 (2009).

13 N.H.—State v. Aberizk, 115 N.H. 535, 345 A.2d 407 (1975).

14 Or.—State v. Stilling, 31 Or. App. 703, 571 P.2d 184 (1977), judgment aff'd, 285 Or. 293, 590 P.2d 1223 (1979).

15 Cal.—People v. Lynch, 209 Cal. App. 4th 353, 146 Cal. Rptr. 3d 811 (3d Dist. 2012), as modified on denial of reh'g, (Oct. 11, 2012).

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16B C.J.S. Constitutional Law § 1320

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

2. Criminal Proceedings

§ 1320. Classification as juvenile in criminal proceedings

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3106

For equal protection purposes, the age of a defendant may provide a meaningful distinction in providing for different treatment of criminal offenses in certain instances. A statute authorizing a juvenile court to waive jurisdiction over a juvenile and have him or her tried under the general law is not violative of equal protection.

The age of a defendant may provide a meaningful distinction in providing for different treatment of criminal offenses in certain instances in determining whether there is a rational relationship to a legitimate state purpose supporting a distinction between the two groups of offenders under an equal protection analysis.[1]

A statute authorizing a juvenile court to waive jurisdiction over a juvenile and have him or her tried under the general law does not violate the constitutional guarantee of equal protection.[2] Similarly, a statute placing exclusive jurisdiction over juvenile offenders in a general trial court does not violate equal protection.[3] Likewise, a provision authorizing the prosecuting attorney to determine the court in which a juvenile is to be prosecuted is not violative of equal protection.[4]

A statute providing discretionary status review procedures for juveniles committed to the custody of a state youth commission after conviction of certain crimes, while denying such procedures to juveniles adjudicated delinquents, does not violate equal protection.[5]

Guardian ad litem.

The mandatory appointment of guardians ad litem for minor defendants in criminal cases does not deny such defendants equal protection in spite of the contention that such a practice precludes such defendants, on the basis of age alone, from choosing the route of defense they feel to be most advantageous.[6]

Sentencing.

Even when a criminal statute makes sentencing classifications based upon age, age is not a "suspect classification" that requires application of strict scrutiny in the context of equal protection.[7]

A sentence of death for a defendant who has been convicted of murder does not violate his or her rights to equal protection merely because, at age 19 when the defendant committed the offense, he or she might have possessed the same attributes of a juvenile offender that prompted the United States Supreme Court to prohibit imposition of the death penalty on offenders under 18 years of age.[8]

Footnotes

1 Cal.—People v. Cavallaro, 178 Cal. App. 4th 103, 100 Cal. Rptr. 3d 139 (6th Dist. 2009).

2 Mo.—Coney v. State, 491 S.W.2d 501 (Mo. 1973).
Utah—Mayne v. Turner, 24 Utah 2d 195, 468 P.2d 369 (1970).

3 Del.—State v. Boardman, 267 A.2d 592 (Del. Super. Ct. 1970).
Difference in treatment from one area of state to another
The treatment of juvenile offenders as adults in one area of the state, but not in the remainder thereof, is unreasonable and constitutes a denial of equal protection.
U.S.—Long v. Robinson, 436 F.2d 1116 (4th Cir. 1971).

4 Ill.—People v. Reese, 54 Ill. 2d 51, 294 N.E.2d 288 (1973).
Okla.—Sherfield v. State, 1973 OK CR 292, 511 P.2d 598 (Okla. Crim. App. 1973).

5 Minn.—Loyd v. Youth Conservation Commission, 287 Minn. 12, 177 N.W.2d 555 (1970).

6 Vt.—In re Reuschel, 135 Vt. 348, 376 A.2d 746 (1977).

7 Mont.—State v. Blue, 2009 MT 304, 352 Mont. 382, 217 P.3d 82 (2009).

8 Ga.—Rogers v. State, 282 Ga. 659, 653 S.E.2d 31 (2007).

16B C.J.S. Constitutional Law § 1321

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

2. Criminal Proceedings

§ 1321. Equal protection and status of the accused as indigent

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3227, 3228

Criminal procedures which discriminate against indigent defendants are inconsistent with the premise of equal protection under the law.

Criminal procedures which discriminate against indigent defendants are inconsistent with the premise of equal protection under the law.[1] A state must, as a matter of equal protection, provide indigents with the basic tools of an adequate defense[2] when those tools are available for a price to other prisoners.[3] These basic tools include a transcript of prior proceedings when that transcript is needed for an effective defense or appeal.,[4] as well as access to physicians,[5] and medical experts in support of an insanity plea[6] or for determining mental competency.[7] When such procedures are made available only to those who can pay, they are invidiously discriminatory and violative of equal protection.[8]

Nonetheless, the State is not required to create an exact equivalence of opportunity for indigents through excessive and pointless expenditure,[9] and there is no denial of equal protection when an indigent defendant's request for certain material or information is denied if such defendant does not show that the requested material or information is necessary in order to procure an adequate

defense.[10] Moreover, the denial of funds to an indigent defendant to pay expenses for investigators and the assistance of experts does not amount to a denial of equal protection.[11]

The refusal of the State to pay the cost for an indigent defendant to take the deposition of witnesses endorsed on the information does not deny equal protection,[12] and the fact that an affluent defendant is able to pay the expenses of a proposed out-of-state witness, while an indigent is not, does not result in a denial of equal protection.[13]

Bail.

An individual is not denied equal protection simply because he or she is indigent and unable to post bail.[14]

Postconviction proceedings; appeal.

A postconviction court has discretion to provide funding for expert witnesses for an indigent capital petitioner when those services are necessary to ensure that the constitutional rights of the defendant are properly protected.[15]

A state's procedure provides adequate and effective review to indigent defendants, as required by the Equal Protection Clause, so long as it reasonably ensures that an indigent's appeal will be resolved in a way that is related to the merit of that appeal.[16]

Prisoner.

To interpose any financial consideration between an indigent prisoner of the state and his or her exercise of a state right to sue for his or her liberty is to deny that prisoner equal protection.[17]

Footnotes

1 Ind.—Brown v. State, 262 Ind. 629, 322 N.E.2d 708 (1975).
Me.—Harrington v. Harrington, 269 A.2d 310 (Me. 1970).
N.Y.—People v. Montgomery, 18 N.Y.2d 993, 278 N.Y.S.2d 226, 224 N.E.2d 730 (1966).
N.C.—State v. Massenburg, 759 S.E.2d 703 (N.C. Ct. App. 2014).
Violation of equal protection rights shown
An indigent's rights under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution are violated when all potential defendants are offered one way to avoid prosecution, and that one way is to pay a fine, and there is no determination as to an individual's ability to pay such a fine.
Miss.—Moody v. State, 716 So. 2d 562 (Miss. 1998).

2 U.S.—Britt v. North Carolina, 404 U.S. 226, 92 S. Ct. 431, 30 L. Ed. 2d 400 (1971); U.S. v. Talbott, 454 F.2d 1111 (8th Cir. 1972).

3 N.C.—State v. Tyson, 220 N.C. App. 517, 725 S.E.2d 97 (2012).

4 N.C.—State v. Tyson, 220 N.C. App. 517, 725 S.E.2d 97 (2012).

5 Ill.—People v. Hiera, 81 Ill. App. 3d 571, 37 Ill. Dec. 400, 402 N.E.2d 290 (3d Dist. 1980).
Forensic pathologist
U.S.—Williams v. Martin, 618 F.2d 1021 (4th Cir. 1980).

6 Ala.—Clark v. State, 56 Ala. App. 67, 318 So. 2d 813 (Crim. App. 1974), writ quashed, 294 Ala. 493, 318 So. 2d 822 (1975).
Restricted use of examination not permitted

A defendant was not entitled to invoke a statute authorizing the appointment of a psychiatrist, but at the same time restrict the use of the psychiatric examination to a determination of whether he should invoke the defense of mental disease or defect, a purpose different from that for which the statute was intended; thus, by refusing to appoint a psychiatrist because of the defendant's demand that the report of the psychiatrist be delivered only to the defense attorney, the court did not deny any right pertaining to equal protection.

Mo.—State ex rel. Jordon v. Mehan, 597 S.W.2d 724 (Mo. Ct. App. E.D. 1980).

No statutory or constitutional right to state-paid psychiatrist

Since the trial court in criminal case is under no constitutional or statutory duty to appoint a state-paid psychiatrist to evaluate a defendant, even though a special plea of insanity has been filed, there was no abuse of discretion in denying a defendant's motion for an additional psychiatrist, and such a denial did not violate the Fifth, Eighth, or Fourteenth Amendments of the United States Constitution, nor the due process or equal protection clauses of the state constitution.

Ga.—Blankenship v. State, 247 Ga. 590, 277 S.E.2d 505 (1981) (overruled on other grounds by, Thompson v. State, 263 Ga. 23, 426 S.E.2d 895 (1993)).

7 Ark.—Hale v. State, 246 Ark. 989, 440 S.W.2d 550 (1969).

No violation of Fourteenth Amendment rights shown

A limitation in a death-penalty statute on expenditures for skilled services for an indigent defendant did not violate the defendant's Fourteenth Amendment rights to due process and equal protection where the defendant received three psychiatric examinations covering a spectrum of the most advanced testing known.

S.C.—State v. Woomer, 276 S.C. 258, 277 S.E.2d 696 (1981) (overruled on other grounds by, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)).

8 U.S.—Long v. District Court of Iowa, In and For Lee County, Fort Madison, Iowa, 385 U.S. 192, 87 S. Ct. 362, 17 L. Ed. 2d 290 (1966).

Access to instruments for vindication of legal rights

Differences in access to instruments needed to vindicate legal rights, when based on the financial situation of the defendant, are repugnant to the United States Constitution.

U.S.—Roberts v. LaVallee, 389 U.S. 40, 88 S. Ct. 194, 19 L. Ed. 2d 41 (1967).

"Peace bond"

(1) It is a denial of equal protection for an indigent to be incarcerated because he or she cannot furnish a cash bond or a proper surety in a "peace bond" proceeding.

W. Va.—Kolvek v. Napple, 158 W. Va. 568, 212 S.E.2d 614 (1975).

(2) As applied to the petitioner, a "peace bond" statute worked an invidious discrimination solely because of the petitioner's financial circumstances and economic status and was therefore violative of equal protection, since the bond to keep the peace, fixed in the amount of $20,000, was excessive, exorbitant, oppressive, and served no other purpose than to assure the petitioner, who was indigent, 12 months' servitude for a mere threatened offense, which is not punishable under the laws.

Ala.—Ex parte James, 53 Ala. App. 632, 303 So. 2d 133 (Crim. App. 1974).

9 Mass.—In re Kinney, 5 Mass. App. Ct. 457, 363 N.E.2d 1337 (1977).

N.C.—State v. Tripp, 52 N.C. App. 244, 278 S.E.2d 592 (1981).

Expert

No court-appointed expert, except competent defense counsel, is required by equal protection to assist a defendant.

Tenn.—State v. Tyson, 603 S.W.2d 748 (Tenn. Crim. App. 1980).

Juror prejudice

The trial court was not shown to have abused its discretion or to have denied equal protection, in denying funds to subsidize an investigation into the possibility of juror prejudice from the possibility that one or more jurors might have been exposed to a newspaper story and to a television program.

Me.—State v. Ledger, 444 A.2d 404 (Me. 1982).

10 N.M.—State v. Turner, 90 N.M. 79, 1976-NMCA-119, 559 P.2d 1206 (Ct. App. 1976).

11 Ala.—Thigpen v. State, 374 So. 2d 401 (Ala. Crim. App. 1979), writ denied, 374 So. 2d 406 (Ala. 1979).

Iowa—State v. Williams, 207 N.W.2d 98 (Iowa 1973).

Or.—State v. Acosta, 41 Or. App. 257, 597 P.2d 1282 (1979).

As to equal protection in regard to expert testimony in criminal proceedings, generally, see § 1336.

At sentencing

Equal protection does not require a trial court to appoint experts to serve as surrogate advocates echoing the arguments of defense counsel at sentencing hearings.

Cal.—People v. Stuckey, 175 Cal. App. 4th 898, 96 Cal. Rptr. 3d 477 (3d Dist. 2009).

12 Mo.—State v. Wallace, 504 S.W.2d 67 (Mo. 1973).

13 N.Y.—People v. Carter, 37 N.Y.2d 234, 371 N.Y.S.2d 905, 333 N.E.2d 177 (1975).

14 § 1323.

15 Tenn.—Reid ex rel. Martiniano v. State, 396 S.W.3d 478 (Tenn. 2013), cert. denied, 134 S. Ct. 224, 187 L. Ed. 2d 167 (2013).

16 U.S.—Yarbrough v. Garrett, 579 F. Supp. 2d 856 (E.D. Mich. 2008).

17 Okla.—Parrott v. State, 1971 OK CR 15, 479 P.2d 619 (Okla. Crim. App. 1971).

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

2. Criminal Proceedings

§ 1322. Equal protection regarding jurisdiction and venue in criminal proceedings

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3780, 3781

A criminal jurisdiction statute containing nonsuspect classifications as to where a state will exert criminal jurisdiction is valid unless the classifications bear no rational relationship to the state's objectives. The fact that an accused is denied a change of venue, when others in allegedly similar circumstances are granted such a change, is not a denial of equal protection where an improper differentiation is not shown.

A criminal jurisdiction statute containing classifications as to where a state will exert criminal jurisdiction, where such classifications are not "suspect" ones, is valid unless the classifications bear no rational relationship to the state's objectives.[1] Where all persons who commit crimes in a federal enclave are subject to the same body of law, the fact that a non-Indian may be subject to state law while an Indian is subject to federal law for a crime committed on an Indian reservation is not a denial of equal protection where the federal statutes do not single out Indians as such.[2] A state code providing for traffic citations issued by state law enforcement to be heard in general sessions court whereas citations issued by local officers must be heard in city court does not violate a defendant's right to equal protection.[3]

The fact that the accused is denied a change of venue when others in allegedly similar circumstances are granted such a change is not a denial of equal protection where no improper differentiation is shown.[4] A change of venue for a criminal trial complies with equal protection when the same laws and procedure are applied in the county to which the venue is transferred.[5]

A criminal defendant in a United States territory is not denied equal protection by being convicted in a court presided over by a nontenured judge sitting as a so-called "legislative court" rather than a "constitutional court."[6] The legislature can, despite a claim of denial of equal protection, in cities above a certain population floor, constitutionally authorize administrative rather than judicial adjudication of traffic infractions.[7]

Transfer of cases.

The possibility of the uncontrolled transfer of cases between trial courts, without justifying cause, or the mere possibility of discrimination in such transfer is not sufficient to establish a violation of equal protection.[8] The assignment of all cases designated "rackets" cases by the prosecutor to a particular part of a particular court does not violate equal protection.[9]

Footnotes

1 U.S.—Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979).
As to strict scrutiny of suspect classifications based on race, ethnicity, or creed, generally, see § 1282.

2 U.S.—U. S. v. Antelope, 430 U.S. 641, 97 S. Ct. 1395, 51 L. Ed. 2d 701 (1977).

3 Tenn.—State v. James, 2011 WL 303268 (Tenn. Crim. App. 2011).

4 U.S.—U. S. ex rel. Lawrence v. Frye, 406 F.2d 98 (7th Cir. 1969).

5 Ohio—State v. Potter, 64 Ohio App. 3d 549, 582 N.E.2d 30 (3d Dist. Henry County 1989).
No violation of equal protection shown
(1) Transfer of venue, in the prosecution of a black defendant for killing a white trooper, to an all-white county, after the defendant moved for change of venue, did not establish an equal protection violation where there was no evidence that the transferring court's venue decision was animated by a discriminatory purpose; moving court treated the black defendant no differently than white defendants, particularly where there was no evidence that the transferring court was aware of the racial composition of the transferee county.
Mo.—Mallett v. State, 769 S.W.2d 77 (Mo. 1989).
(2) In view of the strong preference in the law for the conduct of a trial of criminal charges in the county in which the criminal act took place, whereas no such strong venue preference existed in the area of civil litigation, and where conducting a criminal trial in the vicinity of the offense facilitates production of witnesses and their protection while testifying and also aids the state in safely keeping the accused and in maintaining courtroom security, there were reasonable bases for a difference between change-of-venue procedures available to the parties in civil cases and those available to defendants in criminal cases; therefore, the fact that the procedure to be followed by a civil litigant was less burdensome did not violate equal protection.
Ind.—Capps v. State, 268 Ind. 614, 377 N.E.2d 1338 (1978).

6 U.S.—Government of the Canal Zone v. Scott, 502 F.2d 566 (5th Cir. 1974).

7 N.Y.—Rosenthal v. Hartnett, 36 N.Y.2d 269, 367 N.Y.S.2d 247, 326 N.E.2d 811 (1975).

8 Wis.—State ex rel. Murphy v. Voss, 34 Wis. 2d 501, 149 N.W.2d 595 (1967).

9 N.Y.—People v. Granatelli, 108 Misc. 2d 1009, 438 N.Y.S.2d 707 (Sup 1981).

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

2. Criminal Proceedings

§ 1323. Equal protection pertaining to bail or pretrial release

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3797

Where a state has set up a classification of bailable and nonbailable offenses, the classification must not violate the constitutional guarantee of equal protection.

Where a state has set up a classification of bailable and nonbailable offenses, the classification must not violate the constitutional guarantee of equal protection.[1] However, where a classification based on the offense committed does not implicate a fundamental right or a suspect class, the classification will pass constitutional muster so long as it is rationally related to a legitimate governmental purpose or interest.[2]

An individual is not denied equal protection simply because he or she is indigent and unable to post bail.[3] On the other hand, where a statutory scheme of sentencing places a greater burden on those who are unable to make bond in bailable offenses than on those who are financially able to make bond, a denial of equal protection may occur.[4] Thus, incarceration of those who cannot make money bail, without meaningful consideration of other possible alternatives, infringes on the equal protection requirement.[5] Moreover, a state constitutional provision and a rule of procedure providing for denial of bail create a classification

necessarily affecting the fundamental rights of petitioners and may be upheld only if they promote a compelling governmental interest and represent the least restrictive means of effectuating that interest.[6]

Presentence incarceration, when added to the maximum deprivation of liberty allowed by law, may result in a denial of equal protection.[7] On the other hand, a statute permitting a convicted defendant to be held in jail or to be at liberty on bail without credit on his or her term of imprisonment does not deny equal protection because of indigency, inasmuch as a wealthy person released on bail under the terms of the statute does not receive credit for the time on bail, where the wealth or indigency of a convicted felon has nothing to do with the initial question of eligibility for bail.[8]

Postconviction bail; bail on appeal.

The rational basis test is applicable to an equal protection challenge to a statute denying postconviction bail.[9] An appeal bond statute which does not allow a personal bond on appeal, although a personal bond is permitted for those awaiting trial, has been held not to not violate a defendant's right to equal protection, the distinction between one charged with a felony and one convicted of a felony not being unconstitutional.[10] However, there is also authority that a state deprives a defendant of equal protection by denying him or her bail pending appeal of a conviction, while it apparently allows other violent felons to go free, where the State offers no proof that it denies bail to all persons who are in the same position, raising an inference that the State has acted arbitrarily or for illegitimate reasons.[11]

Amount or conditions of bail or pretrial release.

A double equity requirement under which real property may be used as security for a bail bond only if the net value is twice the amount of the undertaking is rational and does not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, even though it does not apply to personal property, since, among other things, real property has title problems and other hidden defects that are expensive to ascertain and is expensive and difficult to foreclose.[12]

A statute prohibiting any persons charged with a crime involving domestic violence from returning to the residence of the alleged victim while on pretrial release, regardless of the circumstances of the offense and without any opportunity for judicial review, violated equal protection as applied to a particular defendant, where the State has no legitimate interest in barring a person who poses no appreciable risk of harming or intimidating the alleged victim from returning to a shared residence; where the State fails to show that less restrictive alternatives would fail to accomplish its interests in preventing domestic violence and preventing a person accused of domestic violence from tampering with the victim's testimony; and where the statute sweeps too broadly, infringing liberty interests of persons who pose no threat of future violence.[13]

Footnotes

1 N.Y.—Bellamy v. Judges and Justices Authorized to Sit in New York City Criminal Court, 41 A.D.2d 196, 342 N.Y.S.2d 137 (1st Dep't 1973), order aff'd, 32 N.Y.2d 886, 346 N.Y.S.2d 812, 300 N.E.2d 153 (1973).
Rational relationship required
If construed to deny bail to those convicted in the District of Columbia under federal criminal statutes having nationwide application, when bail would otherwise be available, the District of Columbia act would be violative of equal protection, absent a rational relationship between the classification created by the act and any legitimate governmental policy.
U.S.—U.S. v. Thompson, 452 F.2d 1333 (D.C. Cir. 1971).

2 Wash.—Westerman v. Cary, 125 Wash. 2d 277, 892 P.2d 1067 (1994).
As to the rational basis test, generally, see § 1275.

As to strict scrutiny of suspect classifications based on race, ethnicity, or creed, generally, see § 1282.

Rational relationship shown

A statute which included sexual assault in the third degree as a nonbailable offense did not violate the equal protection rights of a defendant, on the ground that nonforcible offenses such as the defendant's were classified together with forcible offenses, since the legislature could reasonably determine that the state had a vital interest in the sexual activity of its younger citizens sufficient to permit similar treatment of juvenile sexual abuse crimes regardless of whether force was involved.

Iowa—State v. Iowa Dist. Court for Scott County, 508 N.W.2d 692 (Iowa 1993).

3 Conn.—Wooten v. Commissioner of Correction, 104 Conn. App. 793, 936 A.2d 263 (2007).

N.Y.—Davis v. Regan, 55 A.D.2d 1012, 391 N.Y.S.2d 491 (4th Dep't 1977).

Impoundment and search of indigents' vehicles

Requiring a person arrested for the second traffic offense in one year to post a bail bond, with the result that a person unable to make bail bond was taken into custody and his automobile was impounded and searched, was not a denial of equal protection notwithstanding a claim that the automobiles of other traffic offenders who could post bail bonds would be neither impounded nor searched.

Ohio—State v. Bradshaw, 41 Ohio App. 2d 48, 70 Ohio Op. 2d 52, 322 N.E.2d 311 (6th Dist. Wood County 1974).

4 Ariz.—State v. Sutton, 21 Ariz. App. 550, 521 P.2d 1008 (Div. 1 1974).

5 U.S.—Pugh v. Rainwater, 572 F.2d 1053 (5th Cir. 1978).

Monetary bail alone

A bail system based on monetary bail alone would be unconstitutional as a denial of equal protection.

Miss.—Lee v. Lawson, 375 So. 2d 1019 (Miss. 1979).

Violation of equal protection shown

A statutory provision which required that a district attorney or other prosecuting attorney be given a minimum of 72 hours' notice of a judicial public bail hearing in order to prepare the issue of whether an eligible defendant should be released on the defendant's own recognizance was unconstitutional in that it violated an indigent defendant's equal protection rights because the classification system it imposed, by which a defendant with financial means could obtain immediate release by posting bail, but an indigent defendant who could not obtain release by cash bail, bail bond, or property bail had to remain incarcerated for minimum of three days was not rationally related to a legitimate public interest.

Ala.—State v. Blake, 642 So. 2d 959 (Ala. 1994).

6 U.S.—Escandar v. Ferguson, 441 F. Supp. 53 (S.D. Fla. 1977).

As to strict scrutiny of classifications affecting fundamental rights, generally, see § 1275.

7 Ariz.—State v. Sutton, 21 Ariz. App. 550, 521 P.2d 1008 (Div. 1 1974).

As to the equal protection rights of pretrial detainees, see § 1324.

8 Wis.—Kubart v. State, 70 Wis. 2d 94, 233 N.W.2d 404 (1975).

Failure to give credit for time served

Where a defendant is justifiably held without bail, the failure to give the defendant credit on his sentence for the time spent in jail before trial is not violative of equal protection.

Ark.—Smith v. State, 256 Ark. 425, 508 S.W.2d 54 (1974).

9 Alaska—Griffith v. State, 641 P.2d 228 (Alaska Ct. App. 1982).

Rational basis shown

A statute denying postconviction bail to defendants convicted of felonious sexual assault does not violate equal protection where the legislature could rationally have determined that individuals convicted of that offense constitute a special danger to the community as distinguished from other felons.

N.H.—Petition of Hamel, 137 N.H. 488, 629 A.2d 802 (1993).

Parole violators

The blanket denial of bail to alleged parole violators, while probation violators are bail eligible, does not deny parole violators equal protection.

N.Y.—People ex rel. Ramos v. Chairman, Bd. of Parole, 69 A.D.2d 870, 415 N.Y.S.2d 262 (2d Dep't 1979).

10 Tex.—Henderson v. State, 236 S.W.3d 814 (Tex. App. Waco 2007).

11 U.S.—U.S. ex rel. Nistler v. Chrans, 720 F. Supp. 115 (N.D. Ill. 1989).

12 N.Y.—People ex rel. Hardy, on Behalf of Miller v. Sielaff, 79 N.Y.2d 618, 584 N.Y.S.2d 742, 595 N.E.2d 817 (1992).

13 **Under state constitution**

Alaska—Williams v. State, 151 P.3d 460 (Alaska Ct. App. 2006).

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2. Criminal Proceedings

§ 1324. Equal protection regarding pretrial detainees

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3788

The constitutional guarantee of equal protection prohibits depriving pretrial detainees of rights of other citizens to a greater extent than necessary to assure their appearance at trial and the security of the jail.

The constitutional guarantee of equal protection prohibits depriving pretrial detainees of rights of other citizens to a greater extent than necessary to assure their appearance at trial and the security of the jail,[1] and dictates that they may not be treated less favorably than convicted persons, unless the difference in treatment is justified by a legitimate government interest.[2] However, treating pretrial detainees less favorably than convicted prisoners does not violate equal protection where such a differentiation has some reasonable basis, and it generally is not required that there be a compelling necessity for the differentiation or that it be the least restrictive means possible.[3] Different treatment of pretrial detainees as compared to some other group is not an equal protection violation when the detainees and the other group are not similarly situated.[4]

A statute providing that a person charged with assault with intent to kill while armed may be held in pretrial detention, if found to pose a danger or if a risk of flight is presented, is not facially invalid under the Equal Protection Clause since the government has a compelling interest for detaining those accused of drive-by shootings who pose a danger to the community or a risk of

flight, until trial, so long as the detention is of a regulatory rather than punitive nature.[5] Similarly, a statute authorizing pretrial detention of a person accused of a crime on the ground of dangerousness proven by clear and convincing evidence, instead of beyond a reasonable doubt, does not violate equal protection rights under a state constitution even though civil commitment on the ground of dangerousness would require proof beyond a reasonable doubt.[6]

Footnotes

1 U.S.—Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974); Dillard v. Pitchess, 399 F. Supp. 1225 (C.D. Cal. 1975); Giampetruzzi v. Malcolm, 406 F. Supp. 836 (S.D. N.Y. 1975).

Restrictions and privations

Subjecting pretrial detainees to restrictions and privations other than those which are inherent in confinement itself, or which are justified by compelling necessities of jail administration, is a violation of equal protection.

U.S.—Owens-El v. Robinson, 442 F. Supp. 1368 (W.D. Pa. 1978).

Dehumanizing conditions

What might otherwise be lawful detention becomes an unconstitutional restriction when prison conditions become so dehumanizing as to constitute an additional hardship beyond the need for custody in violation of the detainees' equal protection rights.

U.S.—Detainees of Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392 (2d Cir. 1975).

2 U.S.—Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974); Lock v. Jenkins, 641 F.2d 488 (7th Cir. 1981); O'Bryan v. Saginaw County, Mich., 437 F. Supp. 582 (E.D. Mich. 1977), judgment entered, 446 F. Supp. 436 (E.D. Mich. 1978).

Freedom of trustees

Pretrial detainees in a county jail were denied equal protection of the laws where they were not allowed the relative freedom of trustees, who were all convicted male prisoners and who were regularly permitted to leave their cells, exercise, have access to telephones, have contact visits, eat hot meals in the dining room, and avoid forced idleness in overcrowded and unsanitary cells.

U.S.—Mitchell v. Untreiner, 421 F. Supp. 886 (N.D. Fla. 1976).

Visitation rights

Where prisoners held in punitive segregation in state prisons were allowed regular visitation rights and no showing had been made to justify different treatment for city prisoners, unconvicted detainees held in punitive segregation in a city prison were likewise entitled to such visitation rights as a matter of equal protection.

U.S.—Giampetruzzi v. Malcolm, 406 F. Supp. 836 (S.D. N.Y. 1975).

3 N.Y.—Cooper v. Morin, 49 N.Y.2d 69, 424 N.Y.S.2d 168, 399 N.E.2d 1188 (1979).

Compelling necessity required

Pretrial detainees do not stand on the same footing as convicted inmates; if pretrial detainees are subjected to restrictions and privations other than those inherent in their confinement itself or which are justified by compelling necessities of jail administration, their rights are violated under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

U.S.—Charron v. Medium Sec. Inst., 730 F. Supp. 987 (E.D. Mo. 1989).

Legitimate classification

A classification between pretrial detainees and convicted prisoners incarcerated in a county jail and felons incarcerated in a state prison was not violative of equal protection as bearing no rational relationship to a legitimate state purpose.

U.S.—Dawson v. Kendrick, 527 F. Supp. 1252 (S.D. W. Va. 1981).

No singling out or discrimination shown

Equal protection was not denied to those who, when apprehended for intoxication in a public place, could not be accommodated, for lack of space, in a detoxification facility operated under a program of civil protective custody for inebriates since there was no singling out or discrimination and each violator was sent to the civil facility if space was available.

Cal.—Johnson v. Municipal Court, 70 Cal. App. 3d 761, 139 Cal. Rptr. 152 (1st Dist. 1977).

4 U.S.—Hunter v. City of New York, 35 F. Supp. 3d 310 (E.D. N.Y. 2014).
Wash.—State v. Haq, 166 Wash. App. 221, 268 P.3d 997 (Div. 1 2012), as corrected, (Feb. 24, 2012).
Body cavity searches
Prearraignment arrestees were not similarly situated to postarraignment detainees, such that the practice of a county sheriff's office of providing privacy for prearraignment strip and/or visual body cavity searches, but not for such searches of postarraignment detainees, did not violate equal protection notwithstanding the contention that the interest in maintaining the privacy of one's body cavities was the same for both arrestees and detainees.
U.S.—Lopez v. Youngblood, 609 F. Supp. 2d 1125 (E.D. Cal. 2009).

5 U.S.—McPherson v. U.S., 692 A.2d 1342 (D.C. 1997).

6 Mass.—Mendonza v. Com., 423 Mass. 771, 673 N.E.2d 22 (1996).

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16B C.J.S. Constitutional Law § 1325

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

2. Criminal Proceedings

§ 1325. Equal protection pertaining to indictment and information; grand juries

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3790, 3791

The constitutional guarantee of equal protection generally does not impose a limitation on a prosecutor's right to choose to proceed either by indictment or by information, but when a state has chosen to afford its citizens the protection of a grand jury indictment procedure, the Equal Protection Clause must be satisfied.

The constitutional guarantee of equal protection is not a limitation on a prosecutor's right to choose to proceed either by indictment or by information[1] or by indictment or accusation.[2] The fact that a defendant is indicted by a grand jury, rather than being proceeded against by information, and thus is not eligible for a redetermination of probable cause does not result in a denial of equal protection.[3] A defendant is not denied equal protection by virtue of the fact that he or she is charged through the grand jury procedure, rather than through a procedure involving a complaint and preliminary examination followed by an information, where the law provides for discretionary treatment at several stages in the prosecution and where the exercise of that discretion does not work a denial of equal protection solely because of disparate treatment in that the denial is not based upon an identifiable class.[4]

For a defendant to prevail on a claim that a law allowing a prosecutor to proceed either by indictment or by information has been applied unequally, he or she must show a deliberate and intentional plan of discrimination against him or her based on some unjustifiable or arbitrary classification.[5]

Equal protection is not violated where an information filed by a prosecuting attorney pursuant to a statutory procedural mandate is based on information and belief rather than personal knowledge.[6] The amendment of the information by the prosecution prior to trial likewise does not violate the defendant's right to equal protection,[7] and the fact that the complaint only charges one crime, but the information, which is filed after the preliminary hearing, charges additional crimes does not deny equal protection on the ground that some defendants are apprised of the crime of which they are ultimately charged prior to the preliminary hearing.[8]

Exercise of prosecutorial discretion.

Generally, the discretion enjoyed by a prosecuting attorney in determining whether to initiate a prosecution by grand jury indictment followed by arrest, or by arrest followed by a preliminary examination, does not deny equal protection.[9] However, when a state has chosen to afford its citizens the protection of a grand jury indictment procedure, the Equal Protection Clause must be satisfied.[10]

Presentation of evidence.

Equal protection requires the presentation of evidence to a grand jury in a fair and impartial manner.[11] Disapproved actions of a prosecutor before a grand jury do not deny equal protection where such is unknown to, and has no influence upon, the petit jury which convicts.[12]

Footnotes

1 Idaho—State v. Edmonson, 113 Idaho 230, 743 P.2d 459 (1987).
No comparison of case
A prosecutor's decision to initiate a capital prosecution by information, rather than by a grand jury indictment, did not violate a defendant's right to equal protection on the basis that the grand jury is deprived of the right to compare the case with other murder cases.
Ind.—Townsend v. State, 533 N.E.2d 1215 (Ind. 1989).

2 Ga.—Webb v. State, 278 Ga. App. 9, 627 S.E.2d 925 (2006).

3 Ariz.—State v. Hinkle, 26 Ariz. App. 561, 550 P.2d 115 (Div. 2 1976).

4 Wyo.—Hennigan v. State, 746 P.2d 360 (Wyo. 1987).

5 Idaho—State v. Edmonson, 113 Idaho 230, 743 P.2d 459 (1987).
Delay in filing information against juvenile
A defendant, who was arrested when a minor, but not charged until he became an adult, was not deprived of equal protection by the prosecutor's delay in filing a trial information against him, despite the argument that, as a juvenile nearing the age of majority, upon his arrest he became subject to adult penalties but was deprived of the protections against overly stale criminal charges afforded adult defendants; the mere act of arresting the defendant did not subject him to adult penalties, and there was never a time when the defendant was subject to adult penalties without receiving the same protection as any other similarly situated adult defendant would have received.
Iowa—State v. Isaac, 537 N.W.2d 786 (Iowa 1995).

6 Mo.—Dean v. State, 461 S.W.2d 861 (Mo. 1971).

7 Wash.—State v. Canady, 69 Wash. 2d 886, 421 P.2d 347 (1966).

8 Wis.—Bailey v. State, 65 Wis. 2d 331, 222 N.W.2d 871 (1974).

9 U.S.—U.S. v. Simon, 510 F. Supp. 232 (E.D. Pa. 1981).
Pa.—Com. v. McCloskey, 443 Pa. 117, 277 A.2d 764 (1971).
As to the applicability of equal protection to preliminary examinations, generally, see § 1327.

10 U.S.—U. S. ex rel. Curtis v. Warden of Green Haven Prison, 463 F.2d 84 (2d Cir. 1972).
Del.—Laub v. State, 366 A.2d 1183 (Del. 1976).
N.J.—State v. Porro, 152 N.J. Super. 259, 377 A.2d 950 (Law Div. 1977), judgment aff'd, 158 N.J. Super. 269, 385 A.2d 1258 (App. Div. 1978).
Pa.—Com. v. Pass, 468 Pa. 36, 360 A.2d 167 (1976).

11 Ariz.—State v. Emery, 131 Ariz. 493, 642 P.2d 838 (1982).
Hearsay testimony
Allowing hearsay testimony at a grand jury proceeding, even though same testimony would have been disallowed at a preliminary hearing, was not violative of equal protection.
Ariz.—State v. Cousino, 18 Ariz. App. 158, 500 P.2d 1146 (Div. 2 1972).

12 Iowa—State v. Hall, 235 N.W.2d 702 (Iowa 1975).

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XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

2. Criminal Proceedings

§ 1326. Equal protection pertaining to indictment and information; grand juries—Selection and composition of grand jury

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3833

Equal protection challenges to the composition of grand juries are governed by the same principles as challenges to the composition of petit juries

Equal protection challenges to the composition of grand juries are governed by the same principles as challenges to the composition of petit juries.[1] A state cannot proceed with a grand jury that is discriminatorily selected or composed.[2]

To show that an equal protection violation has occurred in a grand jury context, the defendant must show that the procedure employed resulted in substantial underrepresentation of his or her race or of the identifiable group to which he or she belongs.[3] More specifically, to make a prima facie case of an equal protection violation in the grand jury context, the defendant must show: (1) that the underrepresented group is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied;[4] (2) the degree of underrepresentation, by comparing the proportion of the group in the total population to proportion called to serve as grand jurors over a significant period of time;[5] and (3) that the selection procedure is susceptible of abuse[6] or is not racially neutral.[7]

Identifiable group.

The rule that when a class of persons in the community has been systematically and purposefully excluded from a grand jury, persons indicted by that grand jury are deemed to have been denied equal protection applies only when members of an identifiable group, such as one identified by race, sex, age, religious belief, educational attainment, political affiliation, economic status, or geographic background, are excluded.[8] However, equal protection of distinct classes in the grand jury selection process does not extend to require proportional representation of the many possible divisions of age, economic, or other groups.[9]

Footnotes

1 U.S.—U.S. v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982).
Constitutional bases for challenges
Cases challenging the makeup of state grand juries are analyzed under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, while the right to a representative state petit jury is protected under the Sixth Amendment fair cross-section requirement, because the Fifth Amendment right to grand jury does not apply to state prosecutions.
U.S.—Aldridge v. Marshall, 765 F.2d 63 (6th Cir. 1985).
As to equal protection challenges to the composition of criminal petit juries, generally, see § 1344.

2 U.S.—U. S. ex rel. Chestnut v. Criminal Court of City of New York, 442 F.2d 611 (2d Cir. 1971).
Ariz.—State v. Acosta, 125 Ariz. 146, 608 P.2d 83 (Ct. App. Div. 1 1980).

3 U.S.—Woodfox v. Cain, 772 F.3d 358 (5th Cir. 2014).
Systematic exclusion or discrimination against cognizable group or class
U.S.—U.S. v. Smith, 463 F. Supp. 680 (E.D. Wis. 1979).
Cal.—People v. Pinell, 43 Cal. App. 3d 627, 117 Cal. Rptr. 913 (1st Dist. 1974).

4 U.S.—Woodfox v. Cain, 772 F.3d 358 (5th Cir. 2014).
Cal.—People v. Romero, 204 Cal. App. 4th 704, 139 Cal. Rptr. 3d 167 (3d Dist. 2012), cert. denied, 133 S. Ct. 842, 184 L. Ed. 2d 666 (2013).
W. Va.—State ex rel. Whitman v. Fox, 160 W. Va. 633, 236 S.E.2d 565 (1977).

5 U.S.—Woodfox v. Cain, 772 F.3d 358 (5th Cir. 2014).
Cal.—People v. Romero, 204 Cal. App. 4th 704, 139 Cal. Rptr. 3d 167 (3d Dist. 2012), cert. denied, 133 S. Ct. 842, 184 L. Ed. 2d 666 (2013).
W. Va.—State ex rel. Whitman v. Fox, 160 W. Va. 633, 236 S.E.2d 565 (1977).
Presumption raised by statistical showing of underrepresentation
A grand jury selection procedure that is susceptible to abuse or not racially neutral supports a presumption of discrimination raised by a statistical showing that a particular group is proportionately underrepresented on grand juries over a significant period of time.
U.S.—Castaneda v. Partida, 430 U.S. 482, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977).

6 U.S.—Woodfox v. Cain, 772 F.3d 358 (5th Cir. 2014); U.S. v. Holman, 510 F. Supp. 1175 (N.D. Fla. 1981).
Cal.—People v. Romero, 204 Cal. App. 4th 704, 139 Cal. Rptr. 3d 167 (3d Dist. 2012), cert. denied, 133 S. Ct. 842, 184 L. Ed. 2d 666 (2013).

7 U.S.—Woodfox v. Cain, 772 F.3d 358 (5th Cir. 2014).
Cal.—People v. Romero, 204 Cal. App. 4th 704, 139 Cal. Rptr. 3d 167 (3d Dist. 2012), cert. denied, 133 S. Ct. 842, 184 L. Ed. 2d 666 (2013).

8 Cal.—People v. Fujita, 43 Cal. App. 3d 454, 117 Cal. Rptr. 757 (4th Dist. 1974).

9 Ariz.—State v. Acosta, 125 Ariz. 146, 608 P.2d 83 (Ct. App. Div. 1 1980).
Cal.—People v. Pinell, 43 Cal. App. 3d 627, 117 Cal. Rptr. 913 (1st Dist. 1974).
Ga.—Welch v. State, 237 Ga. 665, 229 S.E.2d 390 (1976); Gibson v. State, 236 Ga. 874, 226 S.E.2d 63 (1976).
N.Y.—People v. Veralli, 64 Misc. 2d 321, 314 N.Y.S.2d 723 (County Ct. 1970).

Equal apportionment unnecessary

The fact that an indictment was returned by a grand jury selected from grand jury lists made up from supervisors' districts which had not been reapportioned to equalize the number of residents in various districts did not deprive the defendant of equal protection.

Miss.—Polk v. State, 288 So. 2d 452 (Miss. 1974).

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

2. Criminal Proceedings

§ 1327. Equal protection and arraignment; preliminary hearings

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3795, 3796

The failure to allow a criminal defendant a preliminary hearing does not violate the constitutional guaranty of equal protection where the defendant is indicted by a grand jury or where the proceedings are initiated by information.

Arraignment of a defendant by closed-circuit television from jail does not implicate equal protection, despite a contention that there would have been some additional benefit from being in personal attendance in court at the arraignment, where the defendant has counsel physically present at the jail, can see the judge on a closed circuit monitor, receives a copy of the indictment, and is advised of the charges against him or her so that the procedure is identical to that followed at any routine arraignment.[1]

The failure to allow a criminal defendant a preliminary hearing does not violate equal protection where the defendant is indicted by a grand jury[2] or proceedings are initiated by direct information.[3] Equal protection is not violated by a system in which defendants prosecuted by indictment are not afforded a preliminary hearing and the concomitant rights that attach when the prosecution is by information.[4] Similarly, the fact that persons prosecuted via information are entitled to a preliminary hearing at which a record of testimony, available as a public record, is made, whereas persons prosecuted via indictment following a secret

grand jury hearing are deprived of the privilege of reviewing evidence brought forth against them does not deny a defendant proceeded against by indictment equal protection.[5]

The practice of filing all felony complaints and holding all preliminary examinations in one judicial district, regardless of where in the county an alleged felony was committed, and filing no complaints and holding no examinations in the other judicial districts of the county bears a rational relation to a legitimate governmental interest of making the most efficient use of resources and does not deprive felony defendants who reside outside such district of equal protection.[6]

Where single and multiple count complaints, as prescribed by statute, employ the same preliminary hearing rules and procedural treatment, they do not deny a defendant equal protection of the laws since in either case the prosecutor need only establish probable cause to believe the defendant committed the crime alleged with respect to each transactionally distinct count in the complaint.[7]

Transcript of preliminary hearing.

Where a defendant is able to transcribe a preliminary hearing, the denial of a transcript of such a hearing generally is not a denial of equal protection,[8] even where such a defendant is an indigent.[9] However, the denial of an indigent defendant's request for a transcript of a preliminary hearing deprives such a defendant of equal protection where the transcript contains testimony which could be used for impeachment purposes.[10]

Footnotes

1 Ky.—Caudill v. Com., 120 S.W.3d 635 (Ky. 2003), as modified, (Feb. 5, 2004).

2 Ill.—People v. Garza, 92 Ill. App. 3d 723, 48 Ill. Dec. 44, 415 N.E.2d 1328 (3d Dist. 1981).
La.—State v. Holmes, 388 So. 2d 722 (La. 1980).
Nev.—Gibson v. State, 96 Nev. 48, 604 P.2d 814 (1980).
N.C.—State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981).
Or.—State v. Clark, 291 Or. 231, 630 P.2d 810 (1981).
S.D.—State v. Garritsen, 303 N.W.2d 817 (S.D. 1981).
Tenn.—Keener v. State, 598 S.W.2d 836 (Tenn. Crim. App. 1980).
Different procedures notwithstanding
Allowing a county attorney to prosecute by indictment or information was not violative of equal protection despite a claim that, because certain procedures at a preliminary hearing were not attendant to a grand jury proceeding, defendants in the same or similar circumstances were treated so differently as to deny them equal protection.
Ariz.—State v. Bojorquez, 111 Ariz. 549, 535 P.2d 6, 78 A.L.R.3d 1135 (1975).
No fundamental right implicated
Denial of a preliminary hearing procedure does not implicate a fundamental right so as to require strict scrutiny in an equal protection challenge under the Fourteenth Amendment.
Cal.—Bowens v. Superior Court, 1 Cal. 4th 36, 2 Cal. Rptr. 2d 376, 820 P.2d 600 (1991).

3 Colo.—Falgout v. People, 170 Colo. 32, 459 P.2d 572 (1969).
Mont.—Petition of Evans, 147 Mont. 429, 413 P.2d 699 (1966).
As to discrimination with respect to use of informations or indictments and grand jury proceedings, see § 1325.

4 Cal.—Bowens v. Superior Court, 1 Cal. 4th 36, 2 Cal. Rptr. 2d 376, 820 P.2d 600 (1991).

5 Mo.—State v. McCaine, 460 S.W.2d 618 (Mo. 1970).

6 Cal.—Koski v. James, 47 Cal. App. 3d 349, 120 Cal. Rptr. 754 (1st Dist. 1975).

7 Wis.—State v. Akins, 198 Wis. 2d 495, 544 N.W.2d 392 (1996).

8 Ill.—People v. Hanson, 44 Ill. App. 3d 977, 3 Ill. Dec. 778, 359 N.E.2d 188 (3d Dist. 1977).

9 Mass.—Com. v. Britt, 362 Mass. 325, 285 N.E.2d 780 (1972).

As to equal protection in criminal proceedings as affected by the ability to pay, generally, see § 1321.

10 Ill.—People v. Moore, 51 Ill. 2d 79, 281 N.E.2d 294 (1972).

Iowa—State v. Lewis, 215 N.W.2d 293 (Iowa 1974).

Okla.—Parrott v. State, 1971 OK CR 15, 479 P.2d 619 (Okla. Crim. App. 1971).

Statutory payment

A statute requiring the payment of fees for a transcript of a preliminary hearing in a criminal case, as applied to deny a free transcript to an indigent, violates equal protection.

Okla.—Hawkins v. State, 1971 OK CR 238, 486 P.2d 743 (Okla. Crim. App. 1971).

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

2. Criminal Proceedings

§ 1328. Equal protection and the speedy trial requirement

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3805

There may be circumstances in which a delay of a criminal trial amounts to a denial of equal protection of the laws.

There may be circumstances in which a delay of a criminal trial amounts to a denial of equal protection of the laws.[1]

On the other hand, the occurrence of a lag in time between the date of the alleged offense, or filing of the complaint or indictment, and the trial may not constitute a denial of equal protection.[2] For example, the fact that a statute requires the prosecution to be ready for trial within six months after the commencement of criminal actions under the drug laws, while the statute does not specifically require that the prosecution be ready for trial within six months after the commencement of the criminal action for certain homicides, does not constitute a denial of equal protection, even though the drug offenses carry greater penalties than do the homicide offenses, in view of the fact that homicide trials generally require a more thorough and precise preparation by the prosecutor.[3] Likewise, a defendant is not denied equal protection by reason of a state statute which permits the adoption of different time requirements for bringing an arrestee to trial in different counties of the state.[4]

A state's legislative policy of limiting the applicability of its speedy trial rule as to foreign prisoners against whom that state's detainer has been lodged to those imprisoned in jurisdictions in which there exists complementary legislation is not violative of equal protection.[5] However, where a state criminal charge is filed against an accused who is in a federal prison, it is a denial of equal protection of the law for state authorities to deny him or her a speedy trial solely because he or she is unable to pay the expense necessary to bring himself or herself into the state while affording a speedy trial to one financially able to pay transportation expense.[6]

Footnotes

1 U.S.—Hampton v. State of Okl., 368 F.2d 9 (10th Cir. 1966).

Rational basis test applicable

The rational basis test applied to a defendant's claim that a state speedy trial statute violated the Equal Protection Clause of the state constitution by providing different treatment to defendants awaiting retrial following a successful appeal.

Idaho—State v. Avelar, 129 Idaho 700, 931 P.2d 1218 (1997).

Strict scrutiny not required

Procedural rules setting forth speedy trial time periods do not involve a fundamental right requiring strict or even heightened judicial scrutiny under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Wash.—State v. Smith, 117 Wash. 2d 263, 814 P.2d 652 (1991).

2 U.S.—U.S. v. Judice, 457 F.2d 414 (5th Cir. 1972); Finney v. Wainwright, 434 F.2d 1001 (5th Cir. 1970); Kelley v. Kropp, 424 F.2d 518 (6th Cir. 1970).

Ohio—State v. Trapp, 52 Ohio App. 2d 189, 6 Ohio Op. 3d 175, 368 N.E.2d 1278 (1st Dist. Hamilton County 1977).

R.I.—State v. Crescenzo, 118 R.I. 662, 375 A.2d 933 (1977).

Delayed preliminary hearing theory

A rule does not violate equal protection simply on the theory that permitting substantial delay between an arrest and preliminary hearing, and then starting the speedy trial time period running again, does not allow equal protection.

Wash.—State v. Berry, 31 Wash. App. 408, 641 P.2d 1213 (Div. 1 1982).

Different time frames for prisoners and nonprisoners

A rule establishing a one-year time frame for according a speedy trial for prisoners, when weighed against a 180-day time frame for nonprisoners, does not violate equal protection.

Fla.—Yost v. State, 343 So. 2d 99 (Fla. 1st DCA 1977).

3 N.Y.—People v. Mollette, 87 Misc. 2d 236, 383 N.Y.S.2d 817 (Sup 1976).

4 U.S.—Jones v. Perini, 599 F.2d 129 (6th Cir. 1979).

5 Pa.—Com. v. Wagner, 221 Pa. Super. 50, 289 A.2d 210 (1972).

6 Okla.—Naugle v. Freeman, 1969 OK CR 71, 450 P.2d 904 (Okla. Crim. App. 1969).

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Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

2. Criminal Proceedings

§ 1329. Equal protection and discovery in criminal proceedings

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3800

A law which provides the opportunity to discover the prosecution's case must be applied according to constitutional standards of equality.

A law which provides the opportunity to discover the prosecution's case must be applied according to constitutional standards of equality.[1] However, the fact that a state-court defendant does not have access to the more liberal discovery rules of the federal courts does not constitute a violation of equal protection.[2]

A prosecuting attorney's failure to promptly comply with discovery orders does not deny equal protection where all discovery is completed before the trial date.[3] However, a prosecutor's order to a witness not to memorialize statements of the witness, as an attempt to defeat the defendant's right to discovery, violates equal protection.[4]

A defendant is not denied equal protection when he or she is refused discovery of a matter not discoverable under the applicable statute, such as police notes and the reports of the statements of the complaining witness made by such witness to the investigating officers when they received the witness's initial report relating to the alleged crime.[5] Reciprocal pretrial

discovery in the penalty phase of a capital trial does not violate equal protection, even though such discovery is unavailable at a sentencing hearing in a noncapital trial, since the distinction between a capital and noncapital case adequately justifies such a difference in treatment.[6]

Discovery on racially selective prosecution claim.

In order to obtain discovery on a selective-prosecution claim, a criminal defendant must produce some evidence that similarly situated defendants of other races could have been prosecuted but were not.[7] The *Armstrong* rule governing a defendant's right to discovery on a claim of racially discriminatory prosecution is grounded in the Fourteenth Amendment of the United States Constitution and thus applies to state as well as federal prosecutions.[8]

Distinction between criminal and civil discovery rights.

Although the scope of discovery for civil cases is broader than in criminal cases, a criminal defendant is not thereby denied equal protection.[9]

CUMULATIVE SUPPLEMENT

Cases:

Prosecutor's failure to disclose identity of witness who would have rebutted defendant's mitigating character evidence did not violate due process, in penalty phase of capital murder prosecution, where, before penalty phase commenced, prosecutor alerted defendant that a rebuttal witness could provide controverting testimony should defendant present testimony at issue, and defendant had been equivocal on whether or not he would present the testimony. U.S. Const. Amend. 14; Cal. Penal Code § 1054.1. People v. Mora, 5 Cal. 5th 442, 235 Cal. Rptr. 3d 92, 420 P.3d 902 (Cal. 2018).

[END OF SUPPLEMENT]

Footnotes

1 Or.—State v. Clark, 291 Or. 231, 630 P.2d 810 (1981).
Rational relationship shown
Statutes limiting the deposition discovery rights of defendants accused of crimes against victims under 16 were rationally related to effectuating a legitimate state interest in the effective prosecution of such cases and were not violative of equal protection.
N.H.—State v. Heath, 129 N.H. 102, 523 A.2d 82 (1986).

2 Pa.—Com. v. Scott, 469 Pa. 258, 365 A.2d 140 (1976).

3 Ill.—People v. Levine, 99 Ill. App. 3d 141, 55 Ill. Dec. 240, 426 N.E.2d 215 (5th Dist. 1981).

4 Ill.—People v. DeStefano, 30 Ill. App. 3d 935, 332 N.E.2d 626 (1st Dist. 1975).

5 Va.—Bellfield v. Com., 215 Va. 303, 208 S.E.2d 771 (1974).
Officers' privilege against self-incrimination
An order mandating disclosure of police investigatory files did not deny police officers' equal protection on the basis that they were not being accorded the same privilege against self-incrimination as other witnesses, as there was no evidence of any pending or potential criminal charges against any of the officers, and as it did not appear that any of the officers specifically claimed a Fifth Amendment privilege in proceedings before the trial judge so that they could not subsequently claim that the judge violated their Fifth Amendment right.

U.S.—Denver Policemen's Protective Ass'n v. Lichtenstein, 660 F.2d 432 (10th Cir. 1981).

6 Cal.—People v. Superior Court (Mitchell), 5 Cal. 4th 1229, 23 Cal. Rptr. 2d 403, 859 P.2d 102 (1993), as modified on denial of reh'g, (Dec. 30, 1993).

Colo.—People v. Martinez, 970 P.2d 469 (Colo. 1998).

7 U.S.—U.S. v. Armstrong, 517 U.S. 456, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996).

Right to discovery not shown

A black capital defendant lacked the right under *Armstrong* to discovery on his claim that the prosecutor discriminated against blacks in exercising discretion to seek the death penalty where he failed to show "some evidence" that the prosecutor could have charged similarly situated defendants of other races with death penalty specifications but did not.

Ohio—State v. Keene, 81 Ohio St. 3d 646, 1998-Ohio-342, 693 N.E.2d 246 (1998).

8 Ohio—State v. Keene, 81 Ohio St. 3d 646, 1998-Ohio-342, 693 N.E.2d 246 (1998).

9 Ark.—McDole v. State, 339 Ark. 391, 6 S.W.3d 74 (1999).

Cal.—People v. Rountree, 56 Cal. 4th 823, 157 Cal. Rptr. 3d 1, 301 P.3d 150 (2013).

Okla.—Munson v. State, 1988 OK CR 124, 758 P.2d 324 (Okla. Crim. App. 1988).

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16B C.J.S. Constitutional Law § 1330

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

2. Criminal Proceedings

§ 1330. Equal protection in the making and accepting of pleas

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3798

The fact that some codefendants are allowed to plead guilty to lesser charges, and thus receive sentences shorter than that imposed on another defendant, does not deny the latter equal protection.

The fact that some codefendants are allowed to plead guilty to lesser charges, and thus receive sentences shorter than that imposed on another defendant, does not deny the latter equal protection,[1] absent a showing of discriminatory prosecution.[2] Likewise, where the prosecutor presents a defendant with the alternatives of pleading guilty or facing sentencing under a habitual offender statute, such an action does not violate equal protection.[3] Similarly, a criminal defendant is not denied due process or equal protection of the law due to the fact that the state refuses to honor a plea bargain and forces him or her to a trial on the merits solely because of the defendant's inability to make timely restitution.[4]

On the other hand, a prosecutor's refusal to consent to a plea unless a defendant waives his or her right to pursue a civil remedy against the arresting officer is violative of equal protection[5] as is the practice of imposing a waiver of appointed appellate counsel as a plea condition.[6]

Withdrawal of guilty plea.

A subtle difference between the standard to be applied to motions to withdraw guilty pleas in capital cases as opposed to pleas which subject the defendant only to a term of years does not violate equal protection.[7]

Defendants convicted on pleas of guilty are not similarly situated with defendants convicted after trial, for purposes of equal protection analysis of a rule requiring that a motion to withdraw a guilty plea be filed in the same term of court as that in which defendant was sentenced, in that the former class of defendants have admitted committing crimes and the latter class have not.[8]

Footnotes

1 U.S.—Overstreet v. U.S., 367 F.2d 83 (5th Cir. 1966).
Cal.—People v. Tuck, 204 Cal. App. 4th 724, 139 Cal. Rptr. 3d 407 (1st Dist. 2012).
Fla.—Desort v. State, 287 So. 2d 719 (Fla. 3d DCA 1974).
Ill.—People v. Golz, 53 Ill. App. 3d 654, 11 Ill. Dec. 461, 368 N.E.2d 1069 (2d Dist. 1977).
Decision not to accept nolo contendere plea
The government's decision not to support a nolo contendere plea of an accused does not raise an equal protection question in light of an earlier government offer to support a nolo plea if a coconspirator pleaded nolo as well.
U.S.—U.S. v. David E. Thompson, Inc., 621 F.2d 1147 (1st Cir. 1980).
Neutral and rational justification for different treatment of accomplice
The State's decision to offer a plea bargain to a defendant's accomplice and not to offer a plea bargain to the defendant in a murder prosecution did not violate the equal privileges and immunities provision of the Oregon Constitution or the Equal Protection Clause of the United States Constitution where the district attorney adhered to coherent, systematic policy regarding plea agreements and offered a neutral and rational justification for treating the defendant differently from the accomplice.
Or.—State v. Tucker, 315 Or. 321, 845 P.2d 904 (1993).

2 Cal.—People v. Tuck, 204 Cal. App. 4th 724, 139 Cal. Rptr. 3d 407 (1st Dist. 2012).

3 R.I.—State v. DeMasi, 420 A.2d 1369 (R.I. 1980).
Method employed to establish voluntariness
Since the petitioner in a habeas corpus proceeding did not claim that what he conceded in his affidavit executed before the sentencing judge did not satisfy the requirements of waiver, nor did he claim that his plea of guilty was given other than voluntarily and with full knowledge of its consequences, he was not deprived of equal protection by the method employed to establish the voluntariness of his plea.
Utah—Lindeman v. Morris, 641 P.2d 133 (Utah 1982).

4 Okla.—Hainey v. State, 1987 OK CR 120, 740 P.2d 146 (Okla. Crim. App. 1987).
Requirement of express waiver of right to jury not applicable
A constitutional provision requiring an express waiver of the right to a jury when a defendant waives that right does not apply to a guilty plea, and such an interpretation is consistent with federal equal protection principles under the Fourteenth Amendment.
Cal.—People v. Marlow, 34 Cal. 4th 131, 17 Cal. Rptr. 3d 825, 96 P.3d 126 (2004).

5 N.Y.—Kurlander v. Davis, 103 Misc. 2d 919, 427 N.Y.S.2d 376 (Sup 1980).

6 Mich.—People v. Billings, 283 Mich. App. 538, 770 N.W.2d 893 (2009).

7 Ind.—Smith v. State, 593 N.E.2d 1208 (Ind. Ct. App. 1992).

8 Ga.—Smith v. State, 283 Ga. 376, 659 S.E.2d 380 (2008).

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

2. Criminal Proceedings

§ 1331. Equal protection and extradition and detainers

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3794

The use of detainer proceedings against prisoners does not deprive them of equal protection even though their rights to challenge same are more limited than their rights in extradition proceedings.

The use of detainer proceedings against prisoners does not deprive them of equal protection even though their rights to challenge the same are more limited than their rights in extradition proceedings.[1] Thus, giving notice administratively, as provided under the Interstate Agreement on Detainers, to a state prisoner that an untried indictment has been filed against him or her in a second state is adequate, as against a contention of a denial of equal protection for failure to provide judicial notice to the prisoner, as is provided under the Uniform Criminal Extradition Act.[2] Moreover, the failure of the Interstate Agreement on Detainers to provide prisoners with an extradition-type hearing before release to the demanding state does not deny equal protection.[3] Conversely, the fact that under the Uniform Criminal Extradition Act a person subject to extradition proceedings is informed of his or her right and given an opportunity to challenge the legality of his or her hearing at a judicial proceeding immediately after the warrant is issued by the governor, as opposed to under the Uniform Detainer Act, where the person is informed before such warrant is issued, is sufficient to satisfy equal protection requirements.[4]

On the other hand, a classification made between prisoners who are sought under the Uniform Criminal Extradition Act, which affords them the right to be informed by a judge of a court of record of the custody request and their right to contest such, and prisoners sought under the Uniform Detainer Act, who do not have these rights, is violative of equal protection.[5] Such a defect is curable, however, by affording prisoners sought under the Uniform Detainer Act the same type of hearing and judicial advisement of rights as are given under the Uniform Criminal Extradition Act.[6]

Where a detainer filed by one state with the prison authorities of another under the Interstate Agreement on Detainers fails to comply with the provisions of such an agreement, it is a denial of equal protection for the custodial state to give effect to it.[7] The arbitrary decision of a state official to extradite a prisoner under an extradition statute, as opposed to a detainer statute, might result in a technical violation of equal protection.[8]

A fugitive is not denied equal protection by the failure of the governor to grant him or her a hearing when his or her extradition is sought.[9] Likewise, a compact between states for the return of parolees from one state to the other does not deprive one returned under the procedure provided by such compact of equal protection of the laws.[10]

A mere conflict in legal interpretation by judges in the same court, one judge finding an accused subject to extradition based on the sufficiency of hearsay evidence that would have been inadmissible under a state's law, and another judge finding an individual unextraditable based on the conclusion that the sufficiency of the evidence was to be adjudged under the same state's law, does not deny the accused equal protection.[11]

Footnotes

1 Minn.—State v. Bailey, 262 N.W.2d 406 (Minn. 1977).
Pa.—Com. ex rel. Coleman v. Cuyler, 261 Pa. Super. 274, 396 A.2d 394 (1978).

2 Wash.—Hystad v. Rhay, 12 Wash. App. 872, 533 P.2d 409 (Div. 3 1975).

3 Minn.—Wertheimer v. State, 294 Minn. 293, 201 N.W.2d 383 (1972).
N.J.—State v. Thompson, 133 N.J. Super. 180, 336 A.2d 11 (App. Div. 1975).

4 Wash.—Hystad v. Rhay, 12 Wash. App. 872, 533 P.2d 409 (Div. 3 1975).
Wis.—State ex rel. Jackson v. Froelich, 77 Wis. 2d 299, 253 N.W.2d 69 (1977).

5 Wis.—State ex rel. Garner v. Gray, 55 Wis. 2d 574, 201 N.W.2d 163 (1972).

6 Wis.—State ex rel. Garner v. Gray, 55 Wis. 2d 574, 201 N.W.2d 163 (1972).

7 U.S.—Franks v. Johnson, 401 F. Supp. 669 (E.D. Mich. 1975).

8 Wash.—Hystad v. Rhay, 12 Wash. App. 872, 533 P.2d 409 (Div. 3 1975).

9 U.S.—Gerrish v. State of N.H., 97 F. Supp. 527 (D. Me. 1951).

10 Ark.—Gulley v. Apple, 213 Ark. 350, 210 S.W.2d 514 (1948).
N.Y.—People ex rel. Rankin v. Ruthazer, 304 N.Y. 302, 107 N.E.2d 458 (1952).
Ohio—State ex rel. Eikenbary v. Smith, 54 Ohio L. Abs. 253, 87 N.E.2d 590 (Ct. App. 2d Dist. Montgomery County 1948).
Wash.—Pierce v. Smith, 31 Wash. 2d 52, 195 P.2d 112 (1948).

11 U.S.—Harshbarger v. Regan, 599 F.3d 290 (3d Cir. 2010).

16B C.J.S. Constitutional Law § 1332

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

3. Evidence and Witnesses

§ 1332. Regulation of admissibility of evidence and witnesses

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3801

The constitutional guarantee of equal protection of the laws generally is not violated by a statute or rule of court, or by a proper ruling by the court pursuant to such statute or rule of court, which regulates the admissibility of the evidence in a criminal proceeding.

Generally, the constitutional guarantee of equal protection of the laws is not violated by a statute or rule of court, or by a proper ruling by the court pursuant to such statute or rule of court, which regulates the admissibility of the evidence in a criminal proceeding.[1] A law providing that every person is considered competent to be a witness and must be allowed to testify, unless the testimony is otherwise excludable, does not constitute a violation of "equal protection" as the law makes no distinctions or classifications that are suspect under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[2] Likewise, criminal defendants are not denied equal protection of the law because they may not, under a constitutional amendment providing that relevant evidence may not be excluded in any criminal proceeding, seek exclusion of unlawfully seized evidence while parties to civil litigation.[3]

Where a defendant is able to fully cross-examine a witness relative to particular facts and circumstances, the fact that the defendant on voir dire is not able to ask certain questions relative to such facts and circumstances does not constitute a denial of equal protection.[4]

Polygraph test results.

The prosecution has no duty to stipulate to the admission of polygraph test results, where such results are inadmissible absent a stipulation by both parties, and a defendant's equal protection rights are not violated by the State's failure to stipulate to a polygraph examination.[5]

Confessions.

A statute does not deny equal protection by establishing different requirements as to the admissibility of confessions hinging on whether a confession leads to the discovery of inculpatory evidence since such classification is reasonable and rational.[6] Where a defendant's confession is found to be voluntary and is admitted into evidence in a trial on the basis of perjured police testimony, the defendant is denied equal protection.[7]

Impeachment.

The rule which allows for the impeachment of a defendant by evidence of prior convictions does not violate equal protection.[8] A statute which permits impeachment in a criminal case by a felony conviction over a specified number of years old, while such impeachment is not permissible in a civil proceeding, does not deny equal protection.[9]

There is no denial of equal protection when information supplied to the public defender in an application for representation is used to impeach a defendant with regard to prior inconsistent statements in that such information is admissible under generally applicable rules of evidence.[10] A rule permitting the calling party to impeach its own witnesses with prior inconsistent statements admitted as substantive proof, while the opposing party may impeach with prior inconsistent statements but cannot introduce them substantively, is not violative of equal protection.[11]

Sexual offenses.

Defendants in sexual assault cases are not within a suspect classification and, therefore, the Equal Protection Clause requires only that there be a rational and reasonable basis for any classification in rape shield statute and that the classification bear a fair relationship to the purpose of the statute.[12] Evidence provision making prior sexual offenses admissible to prove propensity to commit a charged sexual offense does not violate ex post facto, due process, or equal protection principles.[13] Rules permitting introduction of defendant's prior acts of sexual assault or child molestation in prosecution for sexual assault or child molestation were not unconstitutional under the Due Process Clause or equal-protection component of Fifth Amendment.[14]

Rebuttal witnesses.

A state's use of rebuttal witnesses without allowing the defendant's attorney an opportunity to be apprised of the nature of their testimony and the opportunity to interview them does not deprive the defendant of equal protection where the defendant makes no attempt to utilize any discovery proceedings which may be available and does not request an adjournment or recess of trial in order to be afforded an opportunity to interview such rebuttal witnesses.[15]

Footnotes

1 Cal.—Ex parte Marley, 29 Cal. 2d 525, 175 P.2d 832 (1946).

Tenn.—Osborne v. State, 512 S.W.2d 612 (Tenn. Crim. App. 1974).

Statute precluding evidence of mental capacity

A murder defendant's constitutional rights to due process, use of witnesses, or equal protection were not contravened by statutes precluding the introduction of evidence of mental "capacity" where the defendant was permitted to introduce psychiatric testimony regarding the defendant's mental "condition" at the time of the offenses.

Cal.—People v. McCowan, 182 Cal. App. 3d 1, 227 Cal. Rptr. 23 (3d Dist. 1986).

Rational relationship shown

(1) Rule of evidence allowing a victim to testify at trial in a domestic violence prosecution regarding the defendant's prior acts of domestic violence does not violate the Equal Protection Clause; a class of domestic batterers are not suspect class, and the rule bears a reasonable relationship to a legitimate government interest in effective prosecution of cases of domestic violence.

U.S.—Jensen v. Hernandez, 864 F. Supp. 2d 869 (E.D. Cal. 2012), clarified on denial of reconsideration on other grounds, 2012 WL 2571272 (E.D. Cal. 2012) and aff'd, 572 Fed. Appx. 540 (9th Cir. 2014), petition for certiorari filed, 135 S. Ct. 457, 190 L. Ed. 2d 344 (2014).

(2) A classification drawn by a statute between county and municipal officers, who had to offer to prove to suspected speeders the accuracy of radar speed detectors, and state officers, who were not required to make such an offer, was rationally related to a legitimate governmental objective of preventing local law enforcement officers from using radar to operate local revenue-producing "speed traps," and thus, such a classification did not violate the Equal Protection Clause.

Ga.—Wiggins v. State, 249 Ga. 302, 290 S.E.2d 427 (1982).

Suspect classifications not shown

(1) A statute making admissible out-of-court statements made by children under the age of 12 relating to offenses against the person, sexual offenses, or offenses against the family performed with or on a child by another was not subject to strict scrutiny for purposes of an equal protection analysis on the theory that defendants charged with such offenses constitute a suspect class.

Mo.—State v. Wright, 751 S.W.2d 48 (Mo. 1988).

(2) Domestic violence defendants are not a suspect class under the Equal Protection Clause, and thus, the rational basis test would be applied, when determining whether the statute allowing prior acts of domestic violence to be admissible in a domestic violence trial violates equal protection.

Ill.—People v. Dabbs, 396 Ill. App. 3d 622, 335 Ill. Dec. 782, 919 N.E.2d 501 (3d Dist. 2009), judgment aff'd, 239 Ill. 2d 277, 346 Ill. Dec. 484, 940 N.E.2d 1088 (2010).

As to strict scrutiny of suspect classifications, generally, see § 1276.

As to the rational basis test for equal protection violations, see § 1279.

2 Utah—State v. Fulton, 742 P.2d 1208 (Utah 1987).

Admission of out-of-court statements

Admission of a child-victim's out-of-court statements does not violate due process, equal protection, or the right of confrontation in a case in which the victim is available and produced at trial.

Mo.—State v. Hester, 801 S.W.2d 695 (Mo. 1991).

3 Cal.—In re Lance W., 37 Cal. 3d 873, 210 Cal. Rptr. 631, 694 P.2d 744 (1985).

4 Tex.—Laube v. State, 417 S.W.2d 288 (Tex. Crim. App. 1967).

5 Ind.—Hestand v. State, 491 N.E.2d 976 (Ind. 1986).

6 Tex.—Meza v. State, 577 S.W.2d 705 (Tex. Crim. App. 1979).

7 U.S.—Sellars v. Estelle, 450 F. Supp. 1245 (S.D. Tex. 1977), opinion supplemented on other grounds, 450 F. Supp. 1262 (S.D. Tex. 1978), judgment aff'd, 591 F.2d 1208 (5th Cir. 1979).

8 La.—State v. Prather, 290 So. 2d 840 (La. 1974).

Mont.—State v. Gafford, 172 Mont. 380, 563 P.2d 1129 (1977).

Limiting instruction by court

A ruling that, if a defendant elected to testify, evidence of a prior conviction would be admissible as impeaching evidence did not deny the defendant equal protection of the law where the court noted that an instruction would be given that the prior conviction could be considered only in assessing the defendant's credibility.

Md.—Nance v. State, 7 Md. App. 433, 256 A.2d 377 (1969).

Admission of evidence where credibility is in issue

A statute which permits the admission of evidence of prior felony convictions when a defendant chooses to testify does not deny equal protection, even though such evidence is inadmissible when the defendant does not testify, since the classes of defendants who choose to testify and those who do not are not similarly situated and when a defendant takes the witness stand the defendant's credibility is in issue and evidence of prior felony convictions then becomes relevant.

Colo.—People v. Layton, 200 Colo. 59, 612 P.2d 83 (1980).

9 Colo.—People v. Casey, 185 Colo. 58, 521 P.2d 1250 (1974).

10 Colo.—People v. Lambert, 40 Colo. App. 84, 572 P.2d 847 (App. 1977).

11 U.S.—Skinner v. Cardwell, 564 F.2d 1381 (9th Cir. 1977).

12 Colo.—People v. Villa, 240 P.3d 343 (Colo. App. 2009).

13 Cal.—People v. Flores, 176 Cal. App. 4th 1171, 98 Cal. Rptr. 3d 450 (2d Dist. 2009).

14 U.S.—U.S. v. Stokes, 726 F.3d 880 (7th Cir. 2013), cert. denied, 134 S. Ct. 713, 187 L. Ed. 2d 573 (2013).

15 Mo.—State v. Hooker, 536 S.W.2d 487 (Mo. Ct. App. 1976).

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3. Evidence and Witnesses

§ 1333. Burden of proof and presumptions

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3801

The constitutional guarantee of equal protection of the laws generally is not violated by a statute or rule of court which regulates the burden of proof in a criminal proceeding.

Generally, the constitutional guarantee of equal protection of the laws is not violated by a statute or rule of court which regulates the burden of proof in a criminal proceeding.[1] Thus, for example, a statute placing the burden of establishing insanity upon the defendant does not violate equal protection.[2] Likewise, a statute which permits a defendant to prove mitigating factors to reduce a first-degree murder charge to second-degree murder does not violate equal protection by placing more burdensome procedures on homicide defendants than those faced by other groups of defendants since the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution requires only equality between groups of persons similarly situated and does not require equality for those dissimilarly situated by their commission of different crimes.[3] On the other hand, applying different burdens or standards of proof to prosecutions for the same act results in unequal treatment under the law.[4]

The legislature may also, without violating the Equal Protection Clause, make proof of certain facts prima facie evidence of other facts, to the extent that there is some rational connection between the facts proved and the ultimate facts presumed.[5]

However, the legislature cannot declare that facts which it is prohibited from making a crime will be sufficient, although only prima facie, evidence of a crime.[6]

Footnotes

1 Cal.—People v. Morrison, 218 Cal. 287, 22 P.2d 718 (1933), rev'd on other grounds, 291 U.S. 82, 54 S. Ct. 281, 78 L. Ed. 664 (1934).

Changing rule of evidence as to burden

It is within the constitutional right of the legislature, or of the people in the exercise of the powers of initiative which they have reserved to themselves, to change any rule of evidence now existing, and to place on the defendant in a criminal case of whatsoever character a heavier burden in a trial of the charge against the defendant than the defendant is required to bear under the existing system.

Cal.—People v. Cockrill, 62 Cal. App. 22, 216 P. 78 (3d Dist. 1923), aff'd, 268 U.S. 258, 45 S. Ct. 490, 69 L. Ed. 944 (1925).

Too heavy burden placed on defendant

An instruction in a prosecution for violation of a municipal ordinance prohibiting the affixing of signs upon any building or wall or upon private property without the consent of the owner, which stated that it was the defendant's burden to convince the jury by clear and convincing proof that the ordinance was being discriminatorily enforced, placed too heavy a burden of proof on the defendant and thus constituted a denial of equal protection.

Cal.—People v. Gray, 254 Cal. App. 2d 256, 63 Cal. Rptr. 211 (2d Dist. 1967).

2 Ind.—Basham v. State, 422 N.E.2d 1206 (Ind. 1981).

Tex.—Nilsson v. State, 477 S.W.2d 592 (Tex. Crim. App. 1972).

Requiring proof by preponderance of evidence

Requiring a defendant asserting the affirmative defense of insanity to prove insanity by a preponderance of evidence did not violate equal protection, even though defendants asserting other affirmative defenses were not required to meet similar burdens of proof; the statute did not affect a fundamental right or discriminate against suspect class and was rationally related to preventing the release of persons to again commit crimes.

Ill.—People v. Vernon, 276 Ill. App. 3d 386, 212 Ill. Dec. 772, 657 N.E.2d 1117 (1st Dist. 1995).

Different standards among federal jurisdictions

A District of Columbia statute which required an accused to prove an insanity defense by a preponderance of evidence did not deny equal protection merely because a different standard of proof concerning such a defense is applicable in other federal jurisdictions.

U.S.—U.S. v. Greene, 489 F.2d 1145 (D.C. Cir. 1973).

D.C.—Bethea v. U. S., 365 A.2d 64 (D.C. 1976).

As to strict scrutiny of suspect classifications, generally, see § 1276.

As to the rational basis test for equal protection violations, see § 1279.

As to the applicability of equal protection protections to insanity acquittees, generally, see § 1368.

3 Ill.—People v. Willis, 217 Ill. App. 3d 909, 160 Ill. Dec. 644, 577 N.E.2d 1215 (1st Dist. 1991).

4 Wash.—State v. Kanistanaux, 68 Wash. 2d 652, 414 P.2d 784 (1966).

Different burdens not imposed

A statute does not deprive a defendant of equal protection on the theory that it gives the prosecutor unbridled discretion to choose among different burdens of proof to establish a single offense where the subsections of the statute do not, on their face, impose different burdens of proof for the same act.

Wash.—State v. Foster, 91 Wash. 2d 466, 589 P.2d 789 (1979).

5 U.S.—Cases v. U.S., 131 F.2d 916 (C.C.A. 1st Cir. 1942).

Me.—State v. McNally, 443 A.2d 56 (Me. 1982).

Drawing check as prima facie evidence of intent to defraud

A statute providing that the drawing of a check, payment of which is refused by the depository, is prima facie evidence of an intent to defraud and of knowledge of insufficient funds in, or on credit with, the depository is not unconstitutional as a denial of equal protection.

Ala.—Tolbert v. State, 294 Ala. 738, 321 So. 2d 227 (1975).

Receipt of stolen goods

A presumption that a secondhand dealer who receives stolen goods under circumstances which would cause a reasonable person to make inquiry, and who fails to do so, knows the goods to be stolen does not deny equal protection.

Cal.—People v. Katz, 47 Cal. App. 3d 294, 120 Cal. Rptr. 603 (2d Dist. 1975).

Verbal representation of being armed

A portion of an armed robbery statute making a defendant's verbal representation that the defendant is armed prima facie evidence that the defendant is in fact armed does not have effect of removing the distinction between simple and aggravated robbery but merely permits the jury to infer that the defendant told the truth when asserting that the defendant was armed and thus does not deny equal protection.

Colo.—People v. Murphy, 192 Colo. 411, 559 P.2d 708 (1977).

6 U.S.—Fenner v. Boykin, 3 F.2d 674 (N.D. Ga. 1925), aff'd, 271 U.S. 240, 46 S. Ct. 492, 70 L. Ed. 927 (1926).

Presumption based upon place of birth

A statute which established a presumption that possession of a sawed-off shotgun by an unnaturalized foreign-born person was "for an offensive or aggressive purpose" violated equal protection in that there is no rational connection between a person's place of birth and a disposition to commit offensive or aggressive acts; the removal of a person's alienage by the process of naturalization would not change such a disposition if it existed.

Va.—Sandiford v. Com., 217 Va. 117, 225 S.E.2d 409 (1976).

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3. Evidence and Witnesses

§ 1334. Compulsory process; deposition of witness

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3801

The Sixth Amendment right to compulsory process is encompassed within the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

The Sixth Amendment right to compulsory process is encompassed within the Equal Protection Cause of the Fourteenth Amendment of the United States Constitution.[1] In the absence of any showing that the State is authorized to, or does, subpoena any witness for pretrial purposes, a defendant's contention that the defendant is denied equal protection by being denied the same subpoena power over the victim of the crime, for pretrial examination purposes, that is possessed by the State is without merit.[2]

Equal protection is denied by a statute or rule which requires an insolvent defendant, who desires to have witnesses summoned in the defendant's behalf, to state in an affidavit of insolvency what the defendant expects to prove by the witnesses, whereas a defendant who is able to pay for the subpoenas is not required to do so.[3] However, an indigent defendant is not denied equal protection because the trial court in a misdemeanor prosecution refuses to order the service of subpoenas for the defendant at state expense where there is no showing that the defendant is denied a fair trial as a result of such refusal or that such a ruling has prevented the defendant from securing the attendance of any witness at trial.[4]

Deposition of witness.

A statute which authorizes the expenditure of state funds to defray the cost of the state being represented at the taking of an out-of-state deposition, but which does not authorize any funds for an indigent defendant's court-appointed attorney to travel out-of-state for the purpose of taking a deposition, denies such a defendant equal protection.[5]

Footnotes

1 U.S.—Keener v. State of Tenn., 281 F. Supp. 964 (E.D. Tenn. 1968).
Failure of defendant to subpoena witnesses
Where a defendant's two alibi witnesses, who had not been subpoenaed, were present on the first day of trial but were not present on the second day, the trial court did not err in failing to issue an instanter subpoena for the witnesses or to declare a mistrial, and the defendant was not denied equal protection when the court issued an instanter subpoena for a prosecuting witness but refused to exercise the same power on behalf of the defendant.
N.C.—State v. Wells, 290 N.C. 485, 226 S.E.2d 325 (1976).
Out-of-state witnesses
Equal protection is not denied by the failure of the law to provide a method for compelling the attendance of defense witnesses who are outside the state.
Miss.—Diddlemeyer v. State, 234 So. 2d 292 (Miss. 1970).

2 Del.—McCoy v. State, 361 A.2d 241 (Del. 1976).

3 Fla.—Bailey v. State, 76 Fla. 213, 79 So. 730 (1918).
As to the applicability of the constitutional guarantee of equal protection in cases involving indigency, generally, see § 1321.

4 Wis.—State v. Zwicker, 41 Wis. 2d 497, 164 N.W.2d 512, 32 A.L.R.3d 531 (1969).

5 U.S.—Davis v. Coiner, 356 F. Supp. 695 (N.D. W. Va. 1973).

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3. Evidence and Witnesses

§ 1335. Privileged communications; immunity

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3801

The constitutional guarantee of equal protection is not violated by a statute or court rule making certain persons incompetent to testify for or against one another in a criminal proceeding.

The constitutional guarantee of equal protection is not violated by a statute or court rule making spouses incompetent to testify for or against one another in a criminal proceeding.[1] A statute authorizing a witness to refuse disclosure of a communication relating to the diagnosis or treatment of a mental or emotional disorder, except in a case involving child custody, does not violate equal protection by its failure to compel production of a psychiatric patient's records in a case involving a sexual offense as well as in one of child custody.[2]

Equal protection generally affords an indigent defendant a right to have the appointment of a physician-psychiatrist made confidential.[3] However, notwithstanding a defendant's contention that the defendant is denied equal protection by the admission into evidence of incriminating statements that are protected as privileged communications between a physician and patient, the defendant is not denied equal protection where the psychiatrist has informed the defendant at the start of the interview that a report will be made to the court and that what is said by the defendant in the interview will not be confidential.[4] Likewise, a

provision denying the protection of the psychotherapist-patient privilege to a communication relevant to an issue concerning the mental or emotional condition of a patient, if such an issue has been tendered by the patient, does not violate equal protection.[5]

Grant of immunity.

The State's offer of immunity to one person involved in a criminal transaction to secure testimony against a defendant, who is involved in the same transaction, does not deprive the defendant of equal protection.[6] Furthermore, the fact that a defendant does not have the same right as a prosecutor to initiate a request for a grant of immunity does not constitute a denial of equal protection.[7]

Footnotes

1 Ga.—Cady v. State, 198 Ga. 99, 31 S.E.2d 38 (1944).
Rational basis
Because a disparity in treatment between marriages and "de facto" marriages, for purposes of an antimarital fact privilege, does not burden the exercise of a constitutional right, necessity of such disparity in treatment to promote a compelling state interest need be shown; instead, such a classification must merely bear a rational relationship to a legitimate state goal in order to pass constitutional muster on equal protection grounds.
Ariz.—State v. Watkins, 126 Ariz. 293, 614 P.2d 835 (1980).
As to strict scrutiny of classifications involving fundamental rights, generally, see § 1277.
As to the rational basis test for equal protection violations, see § 1279.

2 Md.—Avery v. State, 15 Md. App. 520, 292 A.2d 728 (1972).
Statute abrogating physician-patient privilege in child-abuse cases
A statute abrogating the physician-patient privilege in either civil or criminal cases involving child abuse does not violate the Equal Protection Clause since the legislature has a rational basis for enacting legislation dealing with the serious problem of child abuse.
Mo.—State v. Ward, 745 S.W.2d 666 (Mo. 1988).

3 Cal.—Torres v. Municipal Court, 50 Cal. App. 3d 778, 123 Cal. Rptr. 553 (2d Dist. 1975).

4 U.S.—Mitchell v. Eyman, 468 F.2d 856 (9th Cir. 1972).

5 Md.—Bremer v. State, 18 Md. App. 291, 307 A.2d 503 (1973).

6 Or.—State v. Clark, 47 Or. App. 389, 615 P.2d 1043 (1980), judgment aff'd, 291 Or. 231, 630 P.2d 810 (1981).
Wis.—State v. Boutch, 60 Wis. 2d 397, 210 N.W.2d 751 (1973).

7 Cal.—People v. Sutter, 134 Cal. App. 3d 806, 184 Cal. Rptr. 829 (5th Dist. 1982).
Ind.—Bubb v. State, 434 N.E.2d 120 (Ind. Ct. App. 1982).
Or.—State v. Clark, 47 Or. App. 389, 615 P.2d 1043 (1980), judgment aff'd, 291 Or. 231, 630 P.2d 810 (1981).
Defendant's witnesses
The Fourteenth Amendment does not give a criminal defendant the right to have immunity from prosecution granted to defendant's witnesses.
Ariz.—State v. Buchanan, 110 Ariz. 285, 518 P.2d 108 (1974).

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3. Evidence and Witnesses

§ 1336. Expert testimony

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3801

Depending on the circumstances of the case, admission or exclusion of expert testimony in a criminal proceeding may or may not deprive the accused of equal protection.

An accused person is not denied equal protection by the court's refusal to provide the defendant with a medical doctor at state expense, for the purpose of examining the complaining witness in a rape prosecution, where the testimony of the doctor who examines the complaining witness is so overwhelmingly favorable to the defendant that the appointment of another doctor will at most provide testimony that only corroborates that of the first doctor.[1] The admission of proof by expert testimony that a substance is marijuana does not amount to a denial of equal protection simply because more stringent safeguards are required before expert testimony may be admitted as to intoxication.[2]

A court's admission of evidence of age and intoxication, for the purpose of determining specific intent, and its exclusion of psychiatric evidence offered for the same purpose does not deprive the defendant of equal protection.[3] Likewise, there is no denial of equal protection in a court's failure to appoint an expert witness to assist an indigent defendant in the defense where it appears that the disadvantage of not having the advice of such an expert is not so great as to deprive the defendant of a fair

trial.[4] However, in a proper factual situation, equal protection may demand that a court appoint an expert who is needed to assist an indigent defendant in the defendant's defense.[5]

Footnotes

1 U.S.—Shepherd v. Nelson, 432 F.2d 1045 (9th Cir. 1970).

2 La.—State v. Watson, 372 So. 2d 1205 (La. 1979).

3 U.S.—Wahrlich v. State of Ariz., 479 F.2d 1137 (9th Cir. 1973).
Ariz.—State v. Doss, 116 Ariz. 156, 568 P.2d 1054 (1977).

4 Alaska—Thessen v. State, 454 P.2d 341 (Alaska 1969).
Examination by state's physician sufficient
Even though a defendant was never examined by a certified psychiatrist, the state's physician's examination was sufficient to satisfy a statutory requirement that a case may proceed if, in the physician's opinion, the defendant was "presently sane," and thus, the defendant was not denied right to equal protection on the theory that, as an indigent, the defendant was not able to hire a psychiatrist to evaluate the defendant's competency to stand trial and to testify as to the defendant's sanity at time of crime.
Okla.—Kaulaity v. State, 1975 OK CR 90, 536 P.2d 1006 (Okla. Crim. App. 1975).
Handwriting expert
Although a defendant was unable to engage a handwriting expert for the amount authorized by the court, where the matter of handwriting was a small portion of the State's case, it was not an essential part of the State's proof, and it was cumulative evidence, the defendant was not prejudiced and the trial court did not abuse its discretion in refusing to dismiss the charges on the ground that the defendant had been denied equal protection of law.
Kan.—State v. Lee, 221 Kan. 109, 558 P.2d 1096 (1976).
Pollster
Where a defendant was unable to demonstrate any particularized and reasonable need for the appointment of a pollster to conduct a public opinion poll at state expense to determine the extent of pretrial publicity, and the defendant made no showing that no other alternatives existed or that such polls would have had a distinct value to the defense, the trial court's denial of the defendant's request did not deprive the defendant of equal protection.
Colo.—People v. McCrary, 190 Colo. 538, 549 P.2d 1320 (1976).
As to the applicability of equal protection principles to classifications involving indigents, generally, see § 1321.

5 Cal.—Torres v. Municipal Court, 50 Cal. App. 3d 778, 123 Cal. Rptr. 553 (2d Dist. 1975).
Like treatment required
The thrust of the Equal Protection Clause, with respect to the furnishing of funds to an indigent defendant to obtain the services of experts, is to require that all persons be treated alike under like circumstances and conditions.
Kan.—State v. Lee, 221 Kan. 109, 558 P.2d 1096 (1976).

16B C.J.S. Constitutional Law § 1337

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§ 1337. Other evidentiary matters; hearsay

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3801

Various other evidentiary matters have been evaluated in light of the constitutional guarantee of equal protection.

The abrogation of the two-witness rule in prosecutions for making false declarations before a court or grand jury does not violate equal protection, and it is permissible to distinguish between proceedings before a court or grand jury and those before a tribunal, officer, or person since such a distinction is neither invidious, arbitrary, nor entirely lacking in rational justification.[1]

A defendant, who is charged with the felonies of vehicular homicide and vehicular assault, is not similarly situated with persons charged with the misdemeanor of driving while under the influence of intoxicating liquor and, thus, such a defendant, who is not entitled to refuse to submit to a blood alcohol test as are persons charged with that misdemeanor, is not denied equal protection.[2]

A defendant who spoke only Spanish was not similarly situated to hearing impaired persons and therefore could not assert an equal protection claim on the basis that a bilingual police officer who took the defendant's statement did not possess the certifications required of a person providing interpreting services during the interrogation of hearing impaired persons; the

inability to hear posed a significant obstacle to a person's ability to function in society, and persons who spoke only Spanish suffered no comparable obstacle.[3]

A statute authorizing the introduction into evidence of conversations recorded through electronic surveillance does not violate equal protection.[4] However, a statute which prohibits private citizens from obtaining evidence by electronic surveillance, but permits the State to do so, may violate equal protection.[5]

Polygraph evidence.

The failure of the State to allow an accused to prove innocence of the offense for which the defendant stands accused, prior to trial, by means of a polygraph, does not constitute a denial of equal protection.[6]

Rape-shield statute.

A rape-shield statute does not violate equal protection by restricting the defendant's freedom to introduce evidence regarding the rape victim's reputation for chastity and morality and prior sexual conduct with third persons without placing a similar restriction on the prosecution.[7]

Hearsay evidence.

In a criminal prosecution, there is no denial of equal protection by the trial court's requirement that a preliminary showing of trustworthiness occur before hearsay testimony tending to exculpate the defendant can be admitted.[8]

A child hearsay statute does not violate the constitutional guarantee of equal protection by allowing the State to bolster the testimony of a victim, while denying the same opportunity to the defendant, in view of the State's strong governmental interest in protecting children.[9]

A statute making admissible certain out-of-court statements made by children under a specified age, relating to sexual or other offenses, is not violative of equal protection.[10]

Footnotes

1 U.S.—U.S. v. Morelli, 373 F. Supp. 458 (S.D. Ohio 1973).
As to strict scrutiny of suspect classifications, generally, see § 1276.
As to the rational basis test for equal protection violations, see § 1279.

2 Colo.—People v. Myers, 198 Colo. 295, 599 P.2d 891 (1979).

3 Conn.—State v. Garcia, 299 Conn. 39, 7 A.3d 355 (2010).

4 U.S.—U.S. v. Horton, 601 F.2d 319 (7th Cir. 1979).

5 La.—Kirk v. State, 526 So. 2d 223 (La. 1988).

6 Ill.—People v. McAleer, 34 Ill. App. 3d 821, 341 N.E.2d 72 (5th Dist. 1975).
Failure to ask defendant to submit to polygraph examination
By not asking a defendant to submit to a polygraph examination, the State did not suppress evidence favorable to the defendant so as to deny the defendant equal protection of the law in view of the unproved reliability of polygraph examinations.
Ariz.—State v. Treadaway, 116 Ariz. 163, 568 P.2d 1061 (1977).

7 Ark.—Dorn v. State, 267 Ark. 365, 590 S.W.2d 297 (1979).
Ill.—People v. Requena, 105 Ill. App. 3d 831, 61 Ill. Dec. 636, 435 N.E.2d 125 (1st Dist. 1982).

8 Wis.—State v. Brown, 85 Wis. 2d 341, 270 N.W.2d 87 (Ct. App. 1978), opinion aff'd, 96 Wis. 2d 238, 291 N.W.2d 528 (1980).

9 Ga.—Weathersby v. State, 262 Ga. 126, 414 S.E.2d 200 (1992).

10 Mo.—State v. Wright, 751 S.W.2d 48 (Mo. 1988).

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4. Assistance of Counsel

§ 1338. Representation by counsel

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West's Key Number Digest

West's Key Number Digest, Constitutional Law 3228, 3774, 3799, 3814, 3817

A criminal defendant is afforded equal protection of the laws when the defendant receives competent, able, and effective representation from an attorney.

A criminal defendant is afforded equal protection of the laws when the defendant receives competent, able, and effective representation from an attorney.[1] Thus, even if public defenders would be better able to provide a defense than attorneys appointed for indigent defendants, defendants for whom attorneys are appointed pursuant to a statutory and regulatory scheme are not denied equal protection if the appointed attorneys provide the effective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution.[2]

A failure to authorize payment for counsel appointed to represent an indigent defendant, in connection with the filing of a petition for discretionary review, does not violate the indigent defendant's due process and equal protection rights.[3] Likewise, an indigent prisoner has no equal protection right to appointed counsel in a postconviction proceeding after exhaustion of the appellate process.[4] Thus, the equal protection guarantee of meaningful access to the courts does not require appointment of counsel for a defendant who has filed a petition, labeled as one seeking a writ of mandamus or prohibition, that is treated as

a petition for habeas corpus.[5] On the other hand, equal protection is denied an accused who is improperly denied counsel or if incompetent counsel is representing the defendant.[6]

An accused who waives the right to counsel is not denied equal protection of the laws by the court's failure to appoint counsel for the accused.[7]

Misfeasance by privately retained counsel is not state action and therefore does not constitute a deprivation of equal protection.[8]

Lineup.

The holding of a lineup with substitute counsel does not violate a defendant's equal protection rights where a bona fide attempt is made to contact the defendant's retained counsel and where the presence of substitute counsel eliminates the hazards which make the lineup a critical stage requiring the presence of retained counsel.[9]

Provision of counsel for state employees.

Since a state has a legitimate interest in providing representation to its employees for suits arising out of the performance of their duties, regardless of whether the acts are allegedly legal or illegal, there is a rational basis for the state's practice of providing legal representation to state employees sued in their individual capacity for allegedly illegal acts while not providing free counsel to prisoners.[10]

Footnotes

1 U.S.—Fitzgerald v. Beto, 479 F.2d 420 (5th Cir. 1973), on reh'g, 505 F.2d 1334 (5th Cir. 1974).
Ga.—Bradshaw v. State, 132 Ga. App. 363, 208 S.E.2d 173 (1974).
Rights under Sixth and Fourteenth Amendments
The fact that a defendant might not be entitled to counsel under the Sixth Amendment of the United States Constitution does not necessarily mean that the defendant is not entitled to counsel under the Equal Protection Clause of the 14th Amendment.
U.S.—Donnell v. Swenson, 302 F. Supp. 1024 (W.D. Mo. 1969).

2 Kan.—State ex rel. Stephan v. Smith, 242 Kan. 336, 747 P.2d 816 (1987).
Failure to appoint two attorneys in capital case
The trial court's refusal to appoint two attorneys to represent the defendant in a capital murder trial was not ineffective assistance of counsel and did not deny the defendant equal protection.
Fla.—Larkins v. State, 655 So. 2d 95 (Fla. 1995).
Representation by public defender
Representation by a public defender's office does not ipso facto deny equal protection.
Cal.—People v. Miller, 7 Cal. 3d 562, 102 Cal. Rptr. 841, 498 P.2d 1089 (1972).

3 Tex.—Peterson v. Jones, 894 S.W.2d 370 (Tex. Crim. App. 1995).

4 U.S.—Pennsylvania v. Finley, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987).
No violation of doctrine of separation of powers
A statute providing that a postconviction petition was to be dismissed within 30 days of its filing if the trial court determined that the petition was "frivolous" or "patently without merit" did not violate the doctrine of separation of powers by conflicting with a rule of the state supreme court providing for appointment of counsel for appeals of postconviction petitions or violate due process or equal protection by not requiring appointment of counsel for indigent petitioners prior to such a determination.
Ill.—People v. Farmer, 148 Ill. App. 3d 723, 102 Ill. Dec. 153, 499 N.E.2d 710 (4th Dist. 1986).
As to the separation-of-powers doctrine, generally, see § 272.

As to the prohibition against encroachment by the legislature on the judiciary, generally, see § 284.

5 Colo.—Brinklow v. Riveland, 773 P.2d 517 (Colo. 1989).

Advice as to right to appeal

Where a prisoner seeking habeas corpus had given counsel the impression that the defendant was well pleased with outcome of the trial and had given no indication to counsel or to the court of a desire to apply for an appeal, neither the court nor counsel was obliged to advise the prisoner of the right to so apply, and the failure to do so was not a denial of equal protection.

Va.—Peyton v. Webb, 207 Va. 417, 149 S.E.2d 889 (1966).

Pretrial detainee

A defendant who was held in jail to await trial in lieu of bail had the right, under the Equal Protection Clause of the Fourteenth Amendment, to receive as effective assistance of counsel as was possible without impinging legitimate security interests of the jail.

U.S.—Pinson v. Williams, 410 F. Supp. 1387 (S.D. Ohio 1975).

Same standard for retained or appointed counsel

The constitutional requirement of equal protection mandates that the standard for determining ineffective assistance of counsel must be the same whether the defense counsel involved is appointed or retained.

Cal.—People v. Cooper, 94 Cal. App. 3d 672, 156 Cal. Rptr. 646 (2d Dist. 1979).

6 U.S.—Todd v. Dowd, 100 F. Supp. 485 (N.D. Ind. 1949).

Infirm attorney

Appointment of an infirm attorney to represent defendants who pleaded guilty, whereas an active practitioner was appointed for defendants pleading not guilty, denied equal protection.

U.S.—Perry v. Beto, 331 F. Supp. 431 (E.D. Tex. 1971).

Private conference

The refusal of defendants to allow juvenile inmates to confer privately with their attorneys, when the defendants could confer privately with counsel and adult prisoners were allowed to confer privately with counsel, denied equal protection.

U.S.—Morales v. Turman, 326 F. Supp. 677 (E.D. Tex. 1971).

Access to attorney

No matter how brief the trial recess, a defendant in a criminal proceeding must have access to the defendant's attorney.

Fla.—Burgess v. State, 117 So. 3d 889 (Fla. 4th DCA 2013).

7 Kan.—State v. Perkins, 156 Kan. 323, 133 P.2d 160 (1943).

Appearance without counsel

Where the trial court gave a defendant a continuance of two months in which to retain an attorney, determined that the defendant was not indigent, and told the defendant most explicitly that the case would be tried on the date set and that the defendant must be there with an attorney if the defendant chose to employ one, the defendant was not denied equal protection when the trial court refused to appoint an attorney for the defendant after the defendant appeared on the date of trial without counsel.

Or.—State v. Sands, 2 Or. App. 575, 469 P.2d 795 (1970).

8 U.S.—McGriff v. Wainwright, 431 F.2d 897 (5th Cir. 1970).

Failure to perfect appeal

Failure of a privately retained counsel to perfect an appeal on behalf of a defendant is attributable, not to the State but to the defendant.

Tenn.—State ex rel. Johnson v. Heer, 219 Tenn. 604, 412 S.W.2d 218 (1966).

As to the necessity of state action, generally, see § 1281.

9 Ga.—Summerville v. State, 226 Ga. 854, 178 S.E.2d 162 (1970).

10 U.S.—Wimberley v. Lynch, 460 F.2d 316 (9th Cir. 1972).

As to the rational basis test for equal protection violations, see § 1279.

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16B C.J.S. Constitutional Law § 1339

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

4. Assistance of Counsel

§ 1339. Representation of indigent defendants

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3228, 3774, 3799, 3814, 3817

Equal protection requires that an indigent defendant be afforded the assistance of legal counsel at every critical stage throughout the criminal process.

Equal protection requires that an indigent defendant be afforded the assistance of legal counsel at every critical stage throughout the criminal process,[1] and the assistance thus provided must be adequate.[2] Thus, the denial of assistance of counsel,[3] as well as the inadequate or ineffective assistance of counsel, on appeal or other postconviction remedy on the merits violates the constitutional guarantee of equal protection.[4]

However, equal protection does not require that an indigent convicted of a crime have the services of an attorney provided by the State to take a frivolous appeal.[5] Thus, the failure to appoint counsel for an indigent defendant on a second appeal is not a denial of equal protection,[6] nor is the denial of the appointment of counsel to assist the defendant in exploring the possibilities for postconviction relief.[7] Moreover, a defendant is not denied equal protection by the failure of a trial court to appoint counsel for the resolution of the issues presented in a postconviction relief petition if an evidentiary hearing is not necessary.[8]

Permitting parolees with sufficient funds to retain attorneys to represent them at parole revocation hearings but refusing to provide such legal representation for indigent parolees is not a denial of equal protection.[9]

Waiver.

A statute providing that an indigent may not waive counsel in a capital case is unconstitutional as infringing on the right of self-representation and as making unconstitutional the discrimination between the indigent and affluent in violation of equal protection.[10]

Footnotes

1 U.S.—U. S. ex rel. O'Brien v. Maroney, 423 F.2d 865 (3d Cir. 1970); U. S. ex rel. Singleton v. Woods, 440 F.2d 835 (7th Cir. 1971).

Appeals

(1) An indigent defendant is denied equal protection of the law where the merits of an appeal as of right are decided without benefit of counsel.

U.S.—Thompson v. Wilson, 523 F. Supp. 2d 626 (N.D. Ohio 2007).

(2) Equal Protection and Due Process Clauses of the Fourteenth Amendment are the source of the guarantee to indigent defendants of assistance of counsel on appeal, and the right to counsel attaches in any first appeal granted by state law as a matter of right but not to discretionary review following initial appeals, state postconviction proceedings, or habeas corpus actions.

Ind.—Mosley v. State, 908 N.E.2d 599 (Ind. 2009).

Delay in appointment until after arraignment

The fact that from the date of an indigent petitioner's arrest until the arraignment, a period of seven weeks, no attorney represented the petitioner did not constitute a denial of equal protection in the absence of any basis to conclude that the alleged alibi witnesses were more likely to be located prior to arraignment than subsequent thereto.

Ill.—People v. Edmonds, 47 Ill. 2d 574, 268 N.E.2d 5 (1971).

Assignment of counsel on basis of race

A deliberate preference for an individual of one race for appointment as assigned counsel, over an individual of another race, is an unconscionable violation of equal protection.

Cal.—People v. Fitzgerald, 29 Cal. App. 3d 296, 105 Cal. Rptr. 458 (2d Dist. 1972).

As to discrimination by reason of race with respect to crimes, generally, see § 1289.

2 Md.—Groh v. Warden, Md. Penitentiary, 1 Md. App. 674, 232 A.2d 826 (1967).

Equal footing

The constitutional basis for supplying legal counsel to indigent persons is to afford such person equal protection of the laws and to place the indigent on an equal footing with those who can, from their own resources, employ counsel and litigate their causes.

Me.—Westberry v. State, 254 A.2d 44 (Me. 1969).

3 U.S.—Maness v. Swenson, 385 F.2d 943 (8th Cir. 1967); Thorbus v. Beto, 339 F. Supp. 501 (W.D. Tex. 1971).

Cal.—In re Banks, 4 Cal. 3d 337, 93 Cal. Rptr. 591, 482 P.2d 215 (1971).

Failure to advise of right to counsel

A state trial judge should have advised an indigent petitioner of the right to court-appointed counsel on appeal if the petitioner were indigent, and failure to give such advice violated the petitioner's equal protection rights.

U.S.—U. S. ex rel. Singleton v. Woods, 440 F.2d 835 (7th Cir. 1971).

Knowledge of indigency

The rule that a state trial court must have knowledge of the indigency of an accused and of the accused's desire to appeal, if its failure to appoint counsel on appeal is to amount to a violation of the Fourteenth

Amendment, rests on the requirement that some state action should have deprived the accused of the right to counsel on appeal; the requisite state action is shown if any responsible state official has knowledge of the indigency of accused and of the accused's desire to appeal.

U.S.—Thorbus v. Beto, 339 F. Supp. 501 (W.D. Tex. 1971).

Second counsel unnecessary

Refusal of a state court to appoint counsel to argue an appeal for habeas corpus petitioners, after a court-appointed counsel had determined that there was no merit in the petitioners' contention that perjured testimony had been knowingly employed, did not in the particular circumstances amount to a deprivation of equal protection.

U.S.—Gallegos v. Turner, 386 F.2d 440 (10th Cir. 1967).

4 U.S.—Anders v. State of Cal., 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

Iowa—State v. Campbell, 215 N.W.2d 227 (Iowa 1974).

Withdrawal by counsel

(1) A defendant who has appointed counsel in a criminal case is protected by equal protection from withdrawal by counsel without the merits of an appeal being set forth by brief on a motion for leave to withdraw.

U.S.—U.S. v. Katz, 296 F. Supp. 1404 (S.D. N.Y. 1969).

(2) Permitting appellate counsel to withdraw, without finding that the appeal was frivolous, deprived the petitioner of the right to equal protection.

Or.—Holbert v. Gladden, 253 Or. 435, 455 P.2d 45 (1969).

Postconviction proceedings

The classification of prisoners as indigent or nonindigent, and the provision of counsel only to the indigent, bears a fair relationship to a legitimate public purpose of providing assistance of counsel for postconviction petitioners unable to retain private counsel as required to satisfy Fourteenth Amendment equal protection; the State's decision to provide competent counsel only for indigent defendants, while leaving postconviction petitioners who can afford counsel responsible for finding competent counsel, does not violate the right of the nonindigent to equal protection of the laws.

Ill.—People v. Csaszar, 2013 IL App (1st) 100467, 377 Ill. Dec. 519, 2 N.E.3d 435 (App. Ct. 1st Dist. 2013), appeal pending, (Mar. 1, 2014) and appeal denied, 379 Ill. Dec. 16, 5 N.E.3d 1125 (Ill. 2014).

5 Fla.—Coleman v. State, 215 So. 2d 96 (Fla. 4th DCA 1968).

Withdrawal by counsel

Where a defendant had court-appointed counsel to handle an appeal, but counsel was relieved upon a statement that the attorney knew of no basis for the appeal and a public defender was then appointed to represent the defendant but was also allowed to withdraw upon a representation that no meritorious grounds for appeal existed, and where the appeal continued with the defendant acting as the defendant's own counsel, the defendant was not deprived of equal protection when additional counsel was not furnished.

Or.—State v. Miller, 247 Or. 348, 430 P.2d 985 (1967).

6 U.S.—U. S. ex rel. Pennington v. Pate, 409 F.2d 757 (7th Cir. 1969).

7 N.M.—State v. Tapia, 80 N.M. 477, 1969-NMCA-066, 457 P.2d 996 (Ct. App. 1969).

Second application

When there has been prior denial of an application for postconviction relief on the grounds for collateral relief which are raised in a subsequent application, it is not a denial of equal protection to deny the second application summarily and without appointment of counsel for the applicant.

Wash.—Honore v. Washington State Bd. of Prison Terms and Paroles, 77 Wash. 2d 660, 466 P.2d 485 (1970).

8 Ark.—Pettingill v. State, 261 Ark. 503, 549 S.W.2d 284 (1977).

9 Idaho—Heath v. State, 94 Idaho 101, 482 P.2d 76 (1971).

10 N.C.—State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972).

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16B C.J.S. Constitutional Law § 1340

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

4. Assistance of Counsel

§ 1340. Choice of counsel; representation of codefendants by same counsel

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3228, 3774, 3799, 3814, 3817

Equal protection is not necessarily denied by the trial court's rejection of an indigent defendant's choice of appointed counsel since the choice of counsel by both indigent and nonindigent defendants is limited by the court's discretion to maintain an orderly trial process.

A claim that equal protection is denied by the trial court's rejection of an indigent defendant's choice of appointed or substitute appointed counsel is without merit since the choice of counsel by both indigent and nonindigent defendants is limited by the trial court's discretion to maintain an orderly trial process.[1]

The appointment of one attorney to represent a defendant and a codefendant in the trial of a criminal charge does not deprive the defendant of equal protection.[2] Moreover, where two or more defendants are represented by the same counsel and no conflict of interest exists, the fact that one defendant is treated more leniently by the court than others does not constitute a denial of equal protection.[3]

Footnotes

1 Iowa—State v. Williams, 285 N.W.2d 248 (Iowa 1979).

Determination of propriety

An indigent's dissatisfaction with court-appointed counsel cannot be made the sole basis for a demand for appointment of new counsel as a matter of constitutional right; if an indigent defendant is dissatisfied with court-appointed counsel, the defendant has a right to ask for appointment of new counsel, stating the reasons for the defendant's dissatisfaction, and the court may then determine the propriety of appointment of new counsel.

Iowa—Roberts v. Bennett, 258 Iowa 1101, 141 N.W.2d 628 (1966).

Appointment of second counsel following dismissal of first

An indigent defendant who dismissed the first appointed counsel was not deprived of the defendant's constitutional rights, on the record, by the trial court's refusal to appoint a second counsel to represent the defendant on appeal.

Iowa—Roberts v. Bennett, 258 Iowa 1101, 141 N.W.2d 628 (1966).

Out-of-state counsel unnecessary

(1) The refusal of a state justice to appoint out-of-state counsel as assigned counsel for indictees in criminal cases arising out of an uprising at a correctional facility was founded on a rational basis, within the equal protection requirement, and did not constitute an abuse of discretion notwithstanding the fact that out-of-state attorneys were permitted to appear pro hac vice.

U.S.—Bedrosian v. Mintz, 518 F.2d 396 (2d Cir. 1975).

(2) Failure to grant a wire fraud defendant out-of-state counsel of choice was not plain error; out-of-state counsel never applied for admission pro hac vice and defendant never advised the court that the cost of local counsel was preventing the defendant from retaining out-of-state counsel as defendant's counsel of choice.

U.S.—U.S. v. Brown, 627 F.3d 1068 (8th Cir. 2010).

As to the rational basis test for equal protection violations, see § 1279.

2 Fla.—Baker v. State, 217 So. 2d 880 (Fla. 1st DCA 1969).

Distinction between death penalty and nondeath penalty cases

Requiring separate counsel for each codefendant in a case where the death penalty is sought, but not in the case where the death penalty is not sought, is not violative of equal protection.

Ga.—Dean v. State, 247 Ga. 724, 279 S.E.2d 217 (1981).

3 N.Y.—People v. Curkendall, 36 A.D.2d 979, 320 N.Y.S.2d 955 (3d Dep't 1971).

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PART VI. Privileges and Immunities; Equal Protection

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4. Assistance of Counsel

§ 1341. Compensation of counsel

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3228, 3774, 3799, 3814, 3817

Limiting the fees payable to appointed counsel to less than the fees charged paying clients in similar circumstances does not violate the constitutional guarantee of equal protection.

Limiting the fees payable to appointed counsel to less than the fees charged paying clients in similar circumstances does not violate the constitutional guarantee of equal protection.[1] Thus, limiting to a specified amount the compensation allowable to counsel appointed to represent an indigent has been held not violative of equal protection principles.[2]

A statute enabling the State to recover expenditures made to provide counsel for an indigent defendant does not violate equal protection by treating criminal defendants differently from civil litigants where any differences are based upon rational distinctions or classifications.[3] Thus, where a recoupment statute permitting the imposition of a condition that the defendant reimburse the court for costs of a court-appointed counsel does not discriminate between convicted defendants and acquitted defendants, it is not in violation of equal protection.[4] However, the rights of acquitted indigent defendants to equal protection were not violated because the courts had the option of allowing convicted indigent defendants to discharge their restitution obligations in regard to attorney's fees for appointed attorneys through community service while courts did not have the option of

allowing acquitted indigent defendants to discharge their restitution obligations in regard to attorney's fees through community service, as a convicted defendant's performance of court-ordered community service was subject to some level of supervision by the criminal justice system, an acquitted defendant was not subject to supervision, and thus, a rational basis existed for the classification.[5]

A statute allowing the State to recover expenditures made to provide counsel for an indigent defendant violates equal protection, where it deprives the indigent defendant of the protective exemptions available to other civil judgment debtors,[6] or where it makes no provision for consideration of the individual circumstances of the defendant.[7] On the other hand, there is no violation of the constitutional guarantee of equal protection where judgment debtors are afforded all exemptions which other debtors receive.[8]

A statute which imposes a lien upon all real and personal property of any person who receives or has received assistance from the public defender does not deny equal protection.[9] However, a provision therein for a continuing lien irrespective of any statute of limitations violates equal protection.[10]

An order which terminates a defendant's free legal services on evidence that the defendant is not indigent, and which directs the defendant to repay to the government the full cost of the defense, does not violate equal protection.[11]

Footnotes

1 Ill.—People v. Atkinson, 50 Ill. App. 3d 860, 8 Ill. Dec. 932, 366 N.E.2d 94 (2d Dist. 1977).

2 Mich.—In re Meizlish, 387 Mich. 228, 196 N.W.2d 129 (1972).

Application to capital cases

A compensation-of-counsel statute did not deprive an indigent defendant of due process or equal protection in its application to capital cases despite a contention that lawyers would not provide effective assistance in such cases unless paid a certain amount of money.

Ala.—Ex parte Grayson, 479 So. 2d 76 (Ala. 1985).

3 Cal.—People v. Amor, 12 Cal. 3d 20, 114 Cal. Rptr. 765, 523 P.2d 1173 (1974).

As to the rational basis test for equal protection violations, generally, see § 1279.

4 N.D.—State v. Kottenbroch, 319 N.W.2d 465 (N.D. 1982).

5 Iowa—State v. Dudley, 766 N.W.2d 606 (Iowa 2009).

6 U.S.—James v. Strange, 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972).

7 U.S.—Olson v. James, 603 F.2d 150 (10th Cir. 1979).

8 Fla.—State v. Williams, 343 So. 2d 35 (Fla. 1977).

9 N.J.—Stroinski v. Office of Public Defender, 134 N.J. Super. 21, 338 A.2d 202 (App. Div. 1975).

10 Fla.—State v. Williams, 343 So. 2d 35 (Fla. 1977).

11 U.S.—U.S. v. Allen, 596 F.2d 227 (7th Cir. 1979).

16B C.J.S. Constitutional Law § 1342

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

5. Right to Jury Trial; Selection of Jurors

§ 1342. Laws governing right to trial by jury

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3105, 3295, 3342, 3378, 3830 to 3832

Laws affecting the right to a trial by jury ordinarily must be equal and uniform throughout the state, and the use of peremptory challenges by a prosecutor to strike prospective jurors on the basis of group membership violates the right of a criminal defendant to equal protection of the laws under the Fourteenth Amendment of the United States Constitution.

State laws affecting the right to a trial by jury ordinarily must be equal and uniform throughout the state.[1] However, a statute or rule of court does not violate the constitutional guarantee of equal protection by prescribing different methods of selecting and impaneling juries in different kinds of cases[2] or in different courts.[3]

Peremptory challenges.

The use of peremptory challenges by a prosecutor to strike prospective jurors on the basis of group membership violates the right of a criminal defendant to equal protection of the laws under the Fourteenth Amendment of the United States Constitution.[4] Thus, a prosecutor's use of peremptory challenges to strike prospective jurors on basis of group bias—that is, bias against members of identifiable group distinguished on racial, religious, ethnic, or similar grounds—violates right of criminal defendant to trial by a

jury drawn from a representative cross-section of the community under the state constitution and right to equal protection under Fourteenth Amendment.[5] A peremptory challenge is itself not a fundamental right but is a statutory right; and while it has utility as an adjunct to the jury selection process and adds to confidence in the impartiality of the jury and effectiveness of counsel, it is not sufficiently elevated by reason of this important role to require the use of a more rigorous equal protection test.[6]

Equal protection is not violated where a statute or court rule prescribes the number of peremptory challenges of jurors allowed in different kinds of cases,[7] or different numbers of such challenges in places of different sizes,[8] or differences with respect to whether the verdict must be unanimous.[9] The constitutional guarantee of equal protection likewise is not violated by various rulings as to the grounds for peremptory challenges.[10]

Footnotes

1 Conn.—State v. Brigandi, 186 Conn. 521, 442 A.2d 927 (1982).
Okla.—Hill v. State, 97 Okla. Crim. 23, 256 P.2d 469 (1953).
Va.—Benson v. Com., 190 Va. 744, 58 S.E.2d 312 (1950).
Freedom from stereotypes
Potential jurors have an equal protection right under both the state and federal constitutions to jury selection procedures free from stereotypical presumptions that reflect and reinforce patterns of historical discrimination.
Fla.—Nowell v. State, 998 So. 2d 597 (Fla. 2008).
Criminal and civil defendants not similarly situated
Criminal and civil defendants are not similarly situated, and thus, the fact that litigants in criminal cases are given juror qualification forms from which prospective jurors' street addresses and phone numbers have been redacted, while litigants in civil cases are given unredacted forms, did not violate the defendant's right to equal protection.
Haw.—State v. Villeza, 85 Haw. 258, 942 P.2d 522 (1997).

2 U.S.—Gardner v. People of State of Michigan, 199 U.S. 325, 26 S. Ct. 106, 50 L. Ed. 212 (1905).
Alaska—Ketzler v. State, 634 P.2d 561 (Alaska Ct. App. 1981).
Criminal versus civil cases
A statute that limits criminal litigants, but not civil litigants, from conducting voir dire in support of peremptory challenges does not violate equal protection.
Cal.—People v. Leung, 5 Cal. App. 4th 482, 7 Cal. Rptr. 2d 290 (6th Dist. 1992), opinion modified, (Apr. 28, 1992).
Capital cases
(1) An accused, who was convicted of capital murder and sentenced to death, was not denied equal protection on the theory that a different jury-selection process was employed against the class of persons accused of capital crimes without any rational or reasonable justification for applying such a procedure.
Tex.—Granviel v. State, 552 S.W.2d 107 (Tex. Crim. App. 1976).
(2) A difference in voir dire procedures for capital and noncapital cases does not deny defendants in noncapital cases equal protection.
S.C.—State v. Brown, 274 S.C. 592, 266 S.E.2d 415 (1980).
As to the rational basis test for equal protection violations, generally, see § 1279.
As to the nature of the penalty as affecting the right to a jury trial, see § 1343.

3 Ga.—McIntyre v. State, 190 Ga. 872, 11 S.E.2d 5, 134 A.L.R. 813 (1940).
Rational basis shown
Denying a husband a jury trial and hearing on charges of criminal contempt for failing to pay child support did not violate the husband's right to equal protection of the law, even though a jury trial would have been available had the case arisen in superior court rather than probate court, since there was a rational basis for the distinction in that probate court's jurisdiction was special and its cases were trenchantly different from those tried in superior court.

Mass.—Edgar v. Edgar, 403 Mass. 616, 531 N.E.2d 590 (1988).

4 Cal.—People v. Roldan, 35 Cal. 4th 646, 27 Cal. Rptr. 3d 360, 110 P.3d 289 (2005) (disapproved of on other grounds by, People v. Doolin, 45 Cal. 4th 390, 87 Cal. Rptr. 3d 209, 198 P.3d 11 (2009)).

As to analysis of racial discrimination in the selection of juries under *Batson v. Kentucky*, see § 1287.

As to exclusion of certain persons or classes from jury service, see § 1344.

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Use of peremptory challenges to exclude Caucasian persons, as a racial group, from criminal jury—post-Batson state cases, 47 A.L.R.5th 259.

Use of peremptory challenges to exclude ethnic and racial groups, other than black Americans, from criminal jury—post-Batson state cases, 20 A.L.R.5th 398.

5 Cal.—People v. Lewis, 39 Cal. 4th 970, 47 Cal. Rptr. 3d 467, 140 P.3d 775 (2006), as modified, (Nov. 1, 2006).

6 Ind.—Martin v. State, 262 Ind. 232, 317 N.E.2d 430 (1974).

As to strict scrutiny of classifications involving fundamental rights, generally, see § 1277.

7 U.S.—Brown v. State of New Jersey, 175 U.S. 172, 20 S. Ct. 77, 44 L. Ed. 119 (1899).

S.C.—State v. Bailey, 273 S.C. 467, 257 S.E.2d 231, 8 A.L.R.4th 145 (1979).

Allocation of challenges to joint defendants

(1) A statute which does not grant criminal defendants being tried jointly as many peremptory challenges as they would have if they were tried separately is rationally related to the legitimate state interest of attempting to equalize the number of peremptory challenges allotted to each side in a criminal case in which defendants are jointly tried and, therefore, does not violate the equal protection rights of jointly tried defendants.

Colo.—People v. Gardenhire, 903 P.2d 1159 (Colo. App. 1995) (overruled on other grounds by, Valdez v. People, 966 P.2d 587 (Colo. 1998)).

(2) A statute granting lone defendants 10 peremptory challenges and granting codefendants, as a group, a total of 10 peremptory challenges which they must collectively exercise is not repugnant to the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Ind.—Martin v. State, 262 Ind. 232, 317 N.E.2d 430 (1974).

(3) Requiring several defendants tried together to join in peremptory challenges is a constitutionally valid procedure, and the joinder requirement does not violate the requirement of equal protection.

Wash.—State v. Allan, 88 Wash. 2d 394, 562 P.2d 632 (1977).

Capital cases and noncapital cases

Disparity between the ratio of government-to-defendant challenges in capital and noncapital cases, under which capital defendants received equal number of challenges as the government, while noncapital defendants received a greater number, did not violate equal protection rights of a capital defendant under rational basis review, given the government's arguably equal interest in exploring juror's attitudes regarding the death penalty.

U.S.—U.S. v. Johnson, 495 F.3d 951 (8th Cir. 2007).

8 U.S.—Hayes v. Missouri, 120 U.S. 68, 7 S. Ct. 350, 30 L. Ed. 578 (1887).

Mo.—State v. McCann, 329 Mo. 748, 47 S.W.2d 95 (1932).

9 La.—State v. Lawrence, 260 La. 169, 255 So. 2d 729 (1971).

Pa.—Com. v. Madison, 271 Pa. Super. 382, 413 A.2d 718 (1979).

Unanimous verdict only in some cases

Provisions requiring unanimous verdicts in capital and five-person jury cases, but permitting conviction or acquittal by the votes of nine jurors in criminal cases in which punishment is necessarily at hard labor, serve a rational purpose of facilitating, expediting, and reducing the expense of administering justice and are not violative of the constitutional guarantee of equal protection.

U.S.—Johnson v. Louisiana, 406 U.S. 356, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972).

La.—State v. Blackwell, 298 So. 2d 798 (La. 1973).

10 Mo.—State v. McCann, 329 Mo. 748, 47 S.W.2d 95 (1932).

Violation of equal protection not shown

(1) The State did not violate the Equal Protection Clause of the Fourteenth Amendment by exercising a peremptory strike based on information obtained outside of voir dire that the victim's brother, a potential witness, had previously shot the juror's stepson.

Ga.—King v. State, 273 Ga. 258, 539 S.E.2d 783 (2000).

(2) The State's exercise of a peremptory strike against a prospective juror who was the minister of a church and knew the defendant's family did not violate the Equal Protection Clause.

Ga.—King v. State, 273 Ga. 258, 539 S.E.2d 783 (2000).

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Disqualification or exemption of juror for conviction of, or prosecution for, criminal offense, 75 A.L.R.5th 295.

Exclusion of women from grand or trial jury or jury panel in criminal case as violation of constitutional rights of accused or as ground for reversal of conviction—state cases, 70 A.L.R.5th 587.

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

5. Right to Jury Trial; Selection of Jurors

§ 1343. Nature of penalty as affecting right to jury

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3105, 3295, 3342, 3378, 3830 to 3832

It is the nature of the penalty a defendant may receive which determines the defendant's equal protection right to receive a trial by jury.

It is the nature of the penalty which the defendant may receive which generally determines the defendant's equal protection right to receive a trial by jury.[1] The proper standard for equal protection review of a statute providing for a jury trial in a case where the court may impose a fine exceeding a specified amount or imprisonment for more than a specified period of time requires that the provision be upheld if it bears some rational relationship to a legitimate state purpose.[2]

A state's denial of a jury trial to misdemeanants tried in a thickly settled city, while granting a jury for trial of the identical offenses in the rest of the state, is not violative of equal protection.[3] The failure of a statute to grant the right to a jury trial for ordinance violations prosecuted in certain courts in specified counties does not deny defendants in such jurisdictions equal protection where they are afforded that right on appeal.[4] On the other hand, where a defendant may be tried for the same act in the same court for violation of a state statute or a city ordinance, at the discretion of the arresting officer, the fact that a defendant who is charged with a violation of the state statute is entitled to a jury trial, without advance payment of a fee, but

must pay a fee in advance to receive a trial by jury if charged with a violation of the ordinance, is violative of the defendant's equal protection rights.[5]

Waiver.

Equal protection of the laws is not denied by a provision for parol waiver of a jury trial.[6] Likewise, a statute which provides that a trial by jury can be waived by a defendant except in a capital case does not deny equal protection to a defendant by forcing the defendant to be tried by a jury in a capital case.[7] A rational basis, rather than strict scrutiny, was the test required to be used in evaluating an equal protection challenge to the existence of three different procedures in different geographic areas of the state for waiver of the right to a jury trial in criminal cases; although right to a jury trial was a fundamental right, the different procedural rules did not impinge on that right.[8]

Footnotes

1 Ill.—People v. Martin-Trigona, 94 Ill. App. 3d 519, 49 Ill. Dec. 743, 418 N.E.2d 763 (4th Dist. 1980).
N.H.—State v. Linsky, 117 N.H. 866, 379 A.2d 813 (1977).
Okla.—Findlay v. City of Tulsa, 1977 OK CR 113, 561 P.2d 980 (Okla. Crim. App. 1977).

2 U.S.—Greene v. Tucker, 375 F. Supp. 892 (E.D. Va. 1974).
As to the rational basis test for equal protection violations, generally, see § 1279.
As to determination of the number of peremptory challenges to prospective jurors based upon the nature of the offense, see § 1342.

3 U.S.—U. S. ex rel. Buonoraba v. Commissioner of Correction, City of New York, 316 F. Supp. 556 (S.D. N.Y. 1970).

4 Minn.—City of St. Paul v. Hitzmann, 295 Minn. 301, 204 N.W.2d 417 (1973).

5 Or.—Miller v. Jordan, 3 Or. App. 134, 472 P.2d 841 (1970).

6 Ill.—People v. D'Angustino, 402 Ill. 203, 83 N.E.2d 695 (1949).

7 Wash.—State v. Boggs, 80 Wash. 2d 427, 495 P.2d 321 (1972).

8 Me.—State v. Poole, 2012 ME 92, 46 A.3d 1129 (Me. 2012).

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

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5. Right to Jury Trial; Selection of Jurors

§ 1344. Exclusion of certain persons or classes from jury service

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3105, 3295, 3342, 3378, 3830 to 3832

Selection of a jury in a criminal trial must be conducted in accordance with the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Selection of a jury in a criminal trial must be conducted in accordance with the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[1] Equal protection of the laws reaches all exclusions from jury service which intentionally and systematically single out any class of persons for different treatment not based on some reasonable classification.[2] However, neither the jury roll nor venire need be a perfect mirror of the community, nor accurately reflect the proportionate strength of every identifiable group, in order to be valid under the Fourteenth Amendment.[3] Moreover, the guaranty of equal protection of the laws does not give a person the right to demand that the jury considering a case be composed, wholly or in part, of persons of the defendant's own class.[4]

The Equal Protection Clause protects against discrimination, exclusion, or substantial underrepresentation of persons from petit or grand juries.[5] Thus, an equal protection violation arises if the jury selection process resulted in substantial underrepresentation of identifiable group.[6]

Violations of the constitutional guarantee of equal protection by the exclusion of certain persons or groups from a jury require a showing of a distinctive group and substantial underrepresentation of that group in jury venires.[7] That is, it must be shown that there is a systematic exclusion or discrimination against a cognizable group.[8]

Burden of proof.

A party challenging the exercise of a peremptory strike as based on discriminatory factors, in violation of the Equal Protection Clause, must first establish a prima facie case of purposeful discrimination, which exists if the challenge is exercised against a member of a constitutionally cognizable group, and if that fact, along with other relevant circumstances, which may include a pattern of strikes against members of the group or the particular questions asked during voir dire, raises the inference that the challenge was based upon membership in the group.[9] Once a prima facie case of purposeful discrimination in the exercise of a peremptory challenge is shown to exist, the burden shifts to the party exercising the peremptory challenge to give a neutral explanation related to the particular case to be tried, and a general denial of discriminatory intent is insufficient for these purposes.[10] The third and final step in considering a challenge to the exercise of a peremptory strike as having been based on impermissible discriminatory factors requires the trial court to consider the proffered explanation to determine whether there is a discriminatory purpose behind the exercise of the peremptory challenge.[11] Thus, on a claim under *Batson v. Kentucky* that a prosecutor has used peremptory challenges in manner violating the Equal Protection Clause, the defendant must first make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race; if such a showing is made, the burden then shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question and, finally, the trial court must determine whether the defendant has carried the burden of proving purposeful discrimination.[12]

Footnotes

1 U.S.—Billingsley v. Clayton, 359 F.2d 13 (5th Cir. 1966).
Miss.—Peterson v. State, 268 So. 2d 335 (Miss. 1972).
W. Va.—State v. Vance, 162 W. Va. 467, 250 S.E.2d 146 (1978).

2 U.S.—O'Hair v. White, 675 F.2d 680 (5th Cir. 1982); U.S. v. Hanson, 618 F.2d 1261, 5 Fed. R. Evid. Serv. 973 (8th Cir. 1980).
Idaho—State v. Padilla, 101 Idaho 713, 620 P.2d 286 (1980).
Exclusion of people charged with felonies
U.S.—U.S. v. Barry, 71 F.3d 1269 (7th Cir. 1995).
Exclusion of non-English speaking persons
Even assuming that non-English speaking persons are a "distinct" class, a significant interest would be advanced by the exclusion of such persons from jury so that the standard of scrutiny required for equal protection purposes would be met.
Mass.—Com. v. Acen, 396 Mass. 472, 487 N.E.2d 189 (1986).
Age as "rational basis" classification
The equal protection analysis of *Batson v. Kentucky* does not apply to the State's use of peremptory challenges based on the ages of prospective jurors; *Batson* does not cover "rational basis" classifications, and an age classification is a "rational basis" classification.
Md.—Bridges v. State, 116 Md. App. 113, 695 A.2d 609 (1997).
As to strict scrutiny of suspect classifications based on race under *Batson*, see § 1282.

As to discrimination in the selection of juries based on the suspect classifications of race, or ethnicity, see § 1287.

As to gender-based discrimination in the selection and composition of juries, see § 1307.

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Exclusion of women from grand or trial jury or jury panel in criminal case as violation of constitutional rights of accused or as ground for reversal of conviction—state cases, 70 A.L.R.5th 587.

Use of peremptory challenges to exclude Caucasian persons, as a racial group, from criminal jury—post-Batson state cases, 47 A.L.R.5th 259.

Use of peremptory challenges to exclude ethnic and racial groups, other than black Americans, from criminal jury—post-Batson state cases, 20 A.L.R.5th 398.

3 Ala.—King v. State, 53 Ala. App. 160, 298 So. 2d 92 (Crim. App. 1974).

"Mixed" or "proportional" jury

Equal protection does not guarantee to a defendant in a criminal case a "mixed" or "proportional" jury.

Mo.—State v. Kelly, 506 S.W.2d 61 (Mo. Ct. App. 1974).

Dual-draw system

A defendant was denied equal protection by virtue of a dual-draw system for selecting a jury, where the effect of such a system was to systematically exclude jurors who would provide a representative cross section of each ethnic group in a metropolitan session by quantitatively diluting their numbers by including persons selected countywide, where the number of Spanish-surnamed adults was much smaller.

Cal.—People v. Flores, 62 Cal. App. 3d Supp. 19, 133 Cal. Rptr. 759 (App. Dep't Super. Ct. 1976).

Statistical test for underrepresentation

An adequate statistical test for determining whether a method of jury selection violates equal protection by creating underrepresentation of certain groups in the community should consider the real percentage of reduction, the numbers of people involved, and the percentage of the population that they constitute.

U.S.—Bradley v. Judges of Superior Court for Los Angeles County, State of Cal. by McCourtney, 531 F.2d 413 (9th Cir. 1976).

4 U.S.—Fay v. People of State of N.Y., 332 U.S. 261, 67 S. Ct. 1613, 91 L. Ed. 2043 (1947).

5 U.S.—Williams v. City of Cleveland, 848 F. Supp. 2d 646 (N.D. Miss. 2012).

6 U.S.—Murray v. Schriro, 746 F.3d 418 (9th Cir. 2014).

7 Cal.—Sandoval v. Superior Court, 27 Cal. App. 3d 741, 104 Cal. Rptr. 157 (2d Dist. 1972).

Burden of proof

The burden of demonstrating that the jury selection system was discriminatory, thereby denying equal protection of the law, was upon the defendant.

Miss.—Hannah v. State, 336 So. 2d 1317 (Miss. 1976).

Question of fact

For purposes of equal protection in selecting a jury, whether a group constitutes a "distinct class" in a particular community is question of fact.

Cal.—People v. Pinell, 43 Cal. App. 3d 627, 117 Cal. Rptr. 913 (1st Dist. 1974).

8 U.S.—Jackson v. Follette, 332 F. Supp. 872 (S.D. N.Y. 1971), order aff'd, 462 F.2d 1041 (2d Cir. 1972); U.S. v. Smith, 463 F. Supp. 680 (E.D. Wis. 1979).

Indians

(1) A 7.2% underrepresentation of Indians on petit juries failed to show that the representation of the "distinctive" group was not fair and reasonable within equal protection requirement.

U.S.—U.S. v. White Lance, 480 F. Supp. 920 (D.S.D. 1979).

(2) The trial judge's purposeful and intentional, although well-meant, exclusion of native Americans as potential jurors as a class without proper examination and individual determination of cause, based on the judge's presumption that all members of the class would be incompetent to serve due to either to prior knowledge they might have of the parties or the crime or fear to act, violated the equal protection rights of the defendant, a Chippewa Indian.

Wis.—State v. Chosa, 108 Wis. 2d 392, 321 N.W.2d 280 (1982).

Students

A trial juror selection procedure, pursuant to which students were not sent questionnaires and were automatically excluded on the ground that it would be a hardship for students to serve, resulting in a large

statistical disparity in the lower age brackets between the number of prospective jurors on the list and those members that would be expected from a true cross-section of eligible jurors, violated equal protection.

N.Y.—People v. Marr, 67 Misc. 2d 113, 324 N.Y.S.2d 608 (J. Ct. 1971).

Amish

The practice of choosing a jury panel from a list of registered voters did not deny the defendant equal protection, notwithstanding the defendant's claim that this practice had the factual effect of excluding Amish people from jury panel, where the defendant failed to show that the defendant was of Amish faith, that Amish people were purposely and systematically eliminated from jury service, or that members of that faith were forbidden to register to vote.

Ind.—Taylor v. State, 260 Ind. 264, 295 N.E.2d 600 (1973).

9 Wash.—State v. Evans, 100 Wash. App. 757, 998 P.2d 373 (Div. 1 2000).

Identification of classification required

Analysis of an equal protection challenge begins with identification of the classification at issue.

Iowa—In re A.W., 741 N.W.2d 793 (Iowa 2007).

As to the prohibition against discriminatory use of peremptory challenges in the selection of juries, generally, see § 1342.

10 Wash.—State v. Evans, 100 Wash. App. 757, 998 P.2d 373 (Div. 1 2000).

11 Wash.—State v. Evans, 100 Wash. App. 757, 998 P.2d 373 (Div. 1 2000).

12 U.S.—Hernandez v. New York, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991).

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

6. Trial and Review

§ 1345. Trial procedures

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3227, 3803 to 3806, 3813, 3814, 3816, 3817

The constitutional guarantee of equal protection calls for procedures in criminal trials which allow no invidious discrimination between persons and between groups of persons.

The constitutional guarantee of equal protection calls for procedures in criminal trials which allow no invidious discrimination between persons and between groups of persons.[1] However, equal protection does not assure a uniformity of judicial decisions or immunity from judicial error.[2]

There is no violation of the constitutional guarantee of equal protection where a criminal defendant fails to show how the defendant has been treated any differently than other criminal defendants.[3] Even if a slight degree of prejudice can be attributed to the presence of uniformed state troopers sitting in the first row of the spectator section during a defendant's trial, sufficient cause for their presence can be found in a state's need to maintain custody over a defendant who has been denied bail after an individualized determination that the defendant's presence at trial could not otherwise be insured.[4] In such a case, the deployment of the troopers is intimately related to the state's legitimate interest in maintaining custody during the proceedings and, thus,

does not offend the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by arbitrarily discriminating against those unable to post bail or to whom bail had been denied.[5]

The justification of administrative convenience as a reason for holding a trial within a prison for an offense committed within that same institution, without a further showing of a compelling state interest, denies a defendant equal protection.[6] On the other hand, a defendant who is a prisoner at the time of trial is not denied equal protection by the trial court's reference to the defendant as "the prisoner" in a charge to the jury to the effect that the prisoner has a right to make an unsworn statement in the defendant's own defense.[7]

The refusal to allow a defendant to wear civilian clothing at trial, in adherence to a local administrative rule that clothes be submitted through the jail, is violative of equal protection.[8] However, a defendant is not denied equal protection at trial by being required to wear clothes of the sort prisoners wear outside of prison, while other inmates testifying at the trial do not, where there is nothing to show that the defendant can be identified as a prisoner by the defendant's dress or that the jury is influenced by such a factor.[9]

The consolidation of two separate criminal cases for trial does not deny equal protection in a proper situation.[10]

Equal protection does not require that those tried in federal court contemporaneously with those tried for the same offense in the local court of the District of Columbia be treated identically.[11]

Order of opening and closing arguments.

A statute providing that the state's counsel has an absolute right to make the closing argument to the jury is not violative of equal protection.[12] Likewise, a statute allowing those defendants not introducing evidence to open and conclude the argument to the jury, while depriving those defendants who introduce evidence of the same right, does not violate equal protection.[13] Similarly, a rule specifying the order of closing argument before the jury wherein the defendant is entitled to make the closing argument to the jury only if the defendant offers no testimony except the defendant's own is not objectionable on the grounds that it denies equal protection by discriminating procedurally against defendants who call witnesses.[14]

Verdict classifications.

A defendant found guilty but mentally ill is not deprived of equal protection by such a verdict classification even though a person who is mentally ill at the time of committing a crime but who does not plead insanity cannot be so found.[15] Moreover, under a statute creating a verdict of guilty but mentally ill, the legislative classification of guilty persons who are mentally ill vis-a-vis guilty persons who are not does not involve a suspect classification or a fundamental right.[16]

New trial.

When the right to move for a new trial is granted by the state to a defendant convicted of a criminal offense, the defendant is protected from invidious discrimination or improper denials with respect thereto by the Equal Protection Clause.[17] However, a defendant's equal protection rights are not violated by the trial court's summary denial of an extraordinary motion for a new trial based on the ground of newly available evidence where the defendant fails to comply with procedural requirements of state law which require that, if the pleadings and the extraordinary motion for a new trial do not contain a statement of facts sufficient to authorize the motion to be granted, it is not error for the trial court to refuse to conduct a hearing on the motion.[18]

Footnotes

1 U.S.—Griffin v. Illinois, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891, 55 A.L.R.2d 1055 (1956).

Pretrial diversion

The government's decision to terminate someone who has violated the terms of a pretrial diversion agreement, like the initial decision to refuse to grant diversion, is subject to judicial review for conformity with equal protection principles.

D.C.—Wood v. U.S., 622 A.2d 67 (D.C. 1993).

2 Kan.—State v. Boone, 218 Kan. 482, 543 P.2d 945 (1975).

No violation of equal protection shown

(1) The denial of a defendant's motion for continuance made on the day of trial did not violate the constitutional principle of equal protection on the ground that the trial judge had granted a motion for continuance filed by the prosecutor.

Ind.—Lawrence v. State, 464 N.E.2d 1291 (Ind. 1984).

(2) A rule permitting the trial in absentia of one accused of a misdemeanor but not of a felony does not violate equal protection even though the maximum sentence for a misdemeanor could exceed the maximum sentence for some felonies.

S.C.—State v. Langston, 275 S.C. 439, 272 S.E.2d 436 (1980).

(3) Application of a more stringent test of effective assistance of counsel in capital sentencing than applied when reviewing such claims in noncapital cases did not violate equal protection, since capital defendants were not a suspect class, and there was a rational basis for the distinction.

U.S.—Woods v. Johnson, 75 F.3d 1017 (5th Cir. 1996).

Minor and unintended flaw

The fact that one who is charged with a traffic violation in county court must demand a trial within 20 days of the plea, whereas one who is brought before a municipal court for the same offense can escape that requirement by appealing whatever results are obtained in the municipal court to the circuit court for a trial de novo and receive a jury trial without a statutory requirement of a timely demand or prepayment of a fee, is, at most, a minor and probably unintended statutory flaw; the discrepancy in the procedures did not amount to denial of equal protection.

Wis.—State ex rel. Prentice v. County Court, Milwaukee County, 70 Wis. 2d 230, 234 N.W.2d 283 (1975).

3 Ark.—Caldwell v. State, 319 Ark. 243, 891 S.W.2d 42 (1995).

Civil and criminal litigants not similarly situated

Denial of an interview of the complaining witness by defense counsel did not violate the constitutional guarantee of equal treatment for persons similarly situated, in that civil defendants had the right to depose witnesses before trial while criminal defendants did not, since civil litigants and criminal defendants were not similarly situated.

Or.—State ex rel. Upham v. Bonebrake, 303 Or. 361, 736 P.2d 1020 (1987).

4 U.S.—Holbrook v. Flynn, 475 U.S. 560, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986).

Wearing of side arm by prosecuting officer in court

The wearing of a side arm by a police officer in uniform, while prosecuting a misdemeanor case in court, does not constitute a denial of equal protection.

N.H.—State v. Whippie, 114 N.H. 369, 322 A.2d 917 (1974).

5 U.S.—Holbrook v. Flynn, 475 U.S. 560, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986).

Refusal to remove armed guards

Refusal of the trial judge to grant a defense request that armed guards be excluded from the courtroom, in a trial of two defendants for armed robbery, was not an abuse of discretion and did not deny the defendants equal protection of the law where the defendants had formerly been convicted of two felonies and each faced a minimum of 20 years in prison if convicted.

Okla.—Leigh v. State, 1985 OK CR 41, 698 P.2d 936 (Okla. Crim. App. 1985).

Shackling of defendant during trial justified

The shackling of a defendant during a trial for murder did not violate the defendant's due process and equal protection rights where the defendant had two prior escape convictions and had resisted arrest in the instant

case and where the judge took precautions to minimize prejudice, including ensuring that the shackles were not visible to the jury.
S.C.—State v. Tucker, 320 S.C. 206, 464 S.E.2d 105 (1995).

6 Ohio—State v. Lane, 60 Ohio St. 2d 112, 14 Ohio Op. 3d 342, 397 N.E.2d 1338 (1979).

7 Ga.—West v. Hopper, 232 Ga. 830, 209 S.E.2d 310 (1974).
As to equal protection with respect to jury instructions in criminal trials, see § 1347.

8 Cal.—People v. Taylor, 31 Cal. 3d 488, 183 Cal. Rptr. 64, 645 P.2d 115 (1982).

9 Kan.—Martin v. State, 215 Kan. 387, 524 P.2d 220 (1974).

10 Ariz.—State v. Ramirez, 126 Ariz. 464, 616 P.2d 924 (Ct. App. Div. 1 1980).

11 U.S.—U. S. v. Frady, 456 U.S. 152, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982).

12 Tex.—Martinez v. State, 501 S.W.2d 130 (Tex. Crim. App. 1973).

13 Ga.—Yeomans v. State, 229 Ga. 488, 192 S.E.2d 362 (1972).

14 Fla.—Preston v. State, 260 So. 2d 501 (Fla. 1972).

15 Mich.—People v. Jackson, 80 Mich. App. 244, 263 N.W.2d 44 (1977).
As to confinement, examination, and commitment of mentally disordered or addicted defendants, see §§ 1365 to 1370.

16 Mich.—People v. McLeod, 407 Mich. 632, 288 N.W.2d 909 (1980).
As to strict scrutiny of classifications involving fundamental rights, generally, see § 1277.

17 Md.—Pinkney v. State, 9 Md. App. 283, 263 A.2d 871 (1970).

18 Ga.—Dick v. State, 248 Ga. 898, 287 S.E.2d 11 (1982).

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PART VI. Privileges and Immunities; Equal Protection

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6. Trial and Review

§ 1346. Qualifications, remarks, and conduct of trial judge

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3227, 3803 to 3806, 3813, 3814, 3816, 3817

A statute permitting lay judges to preside in some cities or districts, while requiring law-trained judges in others, does not deny equal protection to an individual tried by a nonlawyer judge, inasmuch as all people within each classified area are treated equally.

A statute permitting lay judges to preside in some cities or districts, while requiring law-trained judges in others, does not deny equal protection to an individual tried by a nonlawyer judge, inasmuch as all people within each classified area are treated equally.[1] Although a judge who is not an attorney is permitted to preside over offenses which are punishable by incarceration, the transfer of such cases to a judge who is an attorney is not required on equal protection grounds where, if a defendant is found guilty of an offense punishable by incarceration, the defendant is entitled to a trial de novo before a judge who is an attorney.[2]

A defendant is not denied equal protection by not having one judge try a case, where the first judge presides over the case and hears all the evidence, and a substitute judge temporarily replaces the trial judge during jury deliberations and receives the verdict of the jury.[3] Likewise, a governor's designation of a particular justice to try cases brought by a special prosecutor does not violate equal protection.[4]

Prejudice or bias on the part of the trial judge may constitute a denial of equal protection of the laws.[5] However, statements by the trial judge indicating that the judge believes that the defendant is guilty, although ill-advised, do not deny a defendant equal protection where the statements are made outside the presence of the jury.[6] Furthermore, the denial of a defendant's motion to disqualify a judge from hearing a motion to suppress evidence and from conducting the trial does not violate the defendant's right to equal protection even though the only reason the defendant cannot invoke the disqualification statute is that one of the defendant's codefendants has previously invoked it against another judge.[7]

A statute permitting civil litigants to recuse assigned former judges automatically, but not affording criminal defendants the same power, does not violate equal protection.[8]

Footnotes

1 U.S.—North v. Russell, 427 U.S. 328, 96 S. Ct. 2709, 49 L. Ed. 2d 534 (1976).
S.C.—State v. Duncan, 269 S.C. 510, 238 S.E.2d 205 (1977).
Misdemeanors in less populated areas
Providing for the trial of misdemeanors by nonlawyer judges in less-populated areas of the state does not violate equal protection.
Wash.—Young v. Konz, 91 Wash. 2d 532, 588 P.2d 1360 (1979).

2 Minn.—State v. Lindgren, 306 Minn. 133, 235 N.W.2d 379 (1975).
No invidious discrimination shown
The fact that a municipality may have both attorney and nonattorney municipal court judges does not work a denial of equal protection to a criminal defendant tried by a nonattorney judge since if both judges have met the required minimum qualifications there is no invidious discrimination.
N.M.—Tsiosdia v. Rainaldi, 1976-NMSC-011, 89 N.M. 70, 547 P.2d 553 (1976).

3 Mo.—Medley v. State, 639 S.W.2d 401 (Mo. Ct. App. E.D. 1982).

4 U.S.—U. S. ex rel. Monty v. McQuillan, 385 F. Supp. 1308 (E.D. N.Y. 1974), aff'd, 516 F.2d 897 (2d Cir. 1975).

5 Mo.—Osborne v. Purdome, 250 S.W.2d 159 (Mo. 1952).

6 Ga.—Clenney v. State, 229 Ga. 561, 192 S.E.2d 907 (1972).

7 Cal.—Welch v. Superior Court, 41 Cal. App. 3d 50, 115 Cal. Rptr. 729 (2d Dist. 1974).

8 Tex.—Perkins v. State, 902 S.W.2d 88 (Tex. App. El Paso 1995), supplemented, 905 S.W.2d 452 (Tex. App. El Paso 1995), petition for discretionary review refused, (Nov. 8, 1995).

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6. Trial and Review

§ 1347. Instructions to jury

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3227, 3803 to 3806, 3813, 3814, 3816, 3817

Although the denial of a requested jury charge can infringe on equal protection rights, where the evidence supports the court's failure to so charge, equal protection is not denied.

Although the denial of a requested jury charge can infringe on equal protection rights, where the evidence supports the court's failure to so charge, equal protection is not denied.[1] Jury instructions explaining a statutory presumption that intoxication of a repeat offender can be inferred from a specified blood-alcohol content does not affect a suspect class or impair a defendant's fundamental right to a fair trial, so as to trigger a strict-scrutiny analysis of a defendant's equal protection challenge, where the trial court explains to the jury that it is not required to draw the inference, that the inference can be rebutted by other evidence, and that the defendant was presumed innocent.[2]

Where the jury does not assess the punishment in a capital murder case, the fact that the instructions submitting capital murder and two other homicide counts do not state which punishment might be imposed for each of the three submitted offenses does not deprive the defendant of equal protection.[3] In a jurisdiction where the jury may assess the punishment, giving an instruction that, if after due deliberation, the jury is unable to agree on the punishment, it can return a verdict so showing, and, in that

event, the court may assess the punishment does not deprive the defendant of equal protection on the theory that such instruction encourages the jury to avoid the burden of deciding the question of punishment.[4]

Refusal to instruct a jury, in accordance with an amendment to a death-penalty statute that applies only to murders committed after the amendment's effective date, that life imprisonment without parole is an alternative to the death penalty, does not violate the equal protection rights of a defendant who is being prosecuted for a murder committed prior to the effective date of the amendment.[5] Likewise, a trial court's failure in a death-penalty case to inform the jury that a defendant who receives a life sentence would be ineligible for parole for 40 years does not violate due-process and equal protection guarantees under the Fourteenth Amendment.[6] Similarly, prohibiting a defendant from revealing to a jury parole laws applicable to a life sentence for capital murder, but allowing defendants in other felony cases to instruct the jury regarding parole eligibility, does not violate state or federal equal protection guarantees.[7] On the other hand, a trial court violates a defendant's right to due process and equal protection by refusing to instruct a jury, in the sentencing phase of a capital-murder prosecution, on the option to sentence the defendant to life in prison without parole.[8]

Footnotes

1 U.S.—Lewinski v. Ristaino, 448 F. Supp. 690 (D. Mass. 1978).
Inconsequential difference in instructions
A defendant was not denied equal protection by the lower court's use of what the defendant asserted was a less favorable jury instruction on the meaning of the term "reasonable doubt" than that requested, where a higher court had approved both versions of the instruction, indicating its belief that the difference, if any, was inconsequential.
Pa.—Com. v. Boone, 287 Pa. Super. 1, 429 A.2d 689 (1981).

2 Tenn.—State v. Robinson, 29 S.W.3d 476 (Tenn. 2000).

3 Mo.—State v. Reynolds, 608 S.W.2d 422 (Mo. 1980).

4 Mo.—State v. Daugherty, 484 S.W.2d 236 (Mo. 1972).

5 Ind.—Saylor v. State, 686 N.E.2d 80 (Ind. 1997).

6 Tex.—Salazar v. State, 38 S.W.3d 141 (Tex. Crim. App. 2001).

7 Tex.—Curry v. State, 910 S.W.2d 490 (Tex. Crim. App. 1995).

8 Okla.—McCarty v. State, 1995 OK CR 48, 904 P.2d 110 (Okla. Crim. App. 1995).

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6. Trial and Review

§ 1348. Right of indigent defendants to transcript

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3227, 3803 to 3806, 3813, 3814, 3816, 3817

The constitutional guarantee of equal protection requires that an indigent defendant be furnished a transcript of prior proceedings in the same case if a defendant with funds could obtain one.

The constitutional guarantee of equal protection requires that an indigent defendant be furnished a transcript of prior proceedings in the same case if a defendant with the necessary funds could obtain one.[1] Thus, equal protection principles require that the government provide an indigent criminal defendant with a free reporter's transcript of prior proceedings if the transcript is needed for proper appellate review or for an effective defense; the policy behind this rule is to ensure that an indigent defendant receives the basic tools of an adequate defense or appeal when those tools are available for a price to other defendants.[2] A statute which denies a free transcript of a preliminary hearing to an indigent defendant is repugnant to equal protection.[3] Likewise, an indigent defendant is denied equal protection when a request for a transcript of prior proceedings in which a mistrial was declared is denied as untimely, where a solvent defendant would have been free to attempt to purchase a transcript which might have been prepared in time for trial, and the trial court's offer of limited access to the court reporter and the reporter's notes for use during the course of trial is not the substantial equivalent of a transcript.[4] Also, the trial court at an assault trial violated the equal protection rights of an indigent defendant by requiring the defendant to make a particularized showing of need in order

to be entitled to a transcript of a prior mistrial; the reasonable necessity of the transcript was required to be deemed to have been met when the defendant requested the transcript even absent a specific showing of the transcript's utility.[5] Nonetheless, not every denial of a free transcript to an indigent results in a denial of equal protection.[6] A defendant who is not provided with a transcript of a preliminary hearing is not denied equal protection where, under state practice, such a transcript is not available to anyone, whether or not a fee therefor has been paid.[7]

Where the transcript of a defendant's pretrial suppression hearing discloses only trivial inconsistencies between the testimony of the arresting officers at the suppression hearing and at the trial, such a transcript does not constitute an "instrument needed to vindicate legal rights," and the failure to furnish such transcript to a defendant does not violate equal protection.[8] However, the refusal of a defendant's request for a transcript of an alleged accomplice's trial is a denial of equal protection.[9]

Footnotes

1 N.H.—State v. Shute, 122 N.H. 498, 446 A.2d 1162 (1982).
N.C.—State v. Rankin, 306 N.C. 712, 295 S.E.2d 416 (1982).
Ohio—State ex rel. Seigler v. Rone, 42 Ohio St. 2d 361, 71 Ohio Op. 2d 328, 328 N.E.2d 811 (1975).
Availability for a price
If a state has appropriated funds to pay stenographers, has committed itself to record proceedings, and has made transcripts available for a price, there is a denial of equal protection if distribution of transcripts is restricted to defendants with sufficient means to pay for them.
Mass.—Com. v. Britt, 362 Mass. 325, 285 N.E.2d 780 (1972).
Discretionary power to withhold transcript
The discretionary power to withhold a transcript from an indigent defendant is a denial of equal protection of the laws.
Mich.—People v. Cross, 30 Mich. App. 326, 186 N.W.2d 398 (1971), judgment aff'd, 386 Mich. 237, 191 N.W.2d 321 (1971).
As to the right of an indigent to a transcript in conjunction with an appeal, see § 1351.

2 Cal.—People v. Markley, 138 Cal. App. 4th 230, 41 Cal. Rptr. 3d 257 (4th Dist. 2006).
N.C.—State v. Tyson, 220 N.C. App. 517, 725 S.E.2d 97 (2012).

3 U.S.—Roberts v. LaVallee, 389 U.S. 40, 88 S. Ct. 194, 19 L. Ed. 2d 41 (1967).

4 N.C.—State v. Rankin, 306 N.C. 712, 295 S.E.2d 416 (1982).
Substitute for transcript inadequate
The State violated a defendant's equal protection rights by providing counsel with access to the court reporter's tapes from the defendant's two previous trials, rather than providing the defendant with a transcript, where the third trial came five months after the original trial, the trial was fairly extensive, and defense counsel identified inconsistencies in the witnesses' testimony that defense counsel would have been able to bring out on cross-examination if the transcript had been made available.
U.S.—Riggins v. Rees, 74 F.3d 732, 1996 FED App. 0045P (6th Cir. 1996).

5 Mass.—Com. v. Luciano, 79 Mass. App. Ct. 54, 944 N.E.2d 196 (2011).

6 U.S.—U. S. ex rel. Cadogan v. LaVallee, 428 F.2d 165 (2d Cir. 1970).
Ill.—People v. Knowles, 76 Ill. App. 3d 1004, 32 Ill. Dec. 476, 395 N.E.2d 706 (5th Dist. 1979).
Tex.—Ariola v. State, 593 S.W.2d 328 (Tex. Crim. App. 1979).
Failure to show prejudice
A defendant was not denied equal protection because a request for a free transcript of the evidence of a previous trial, which resulted in a mistrial, was denied by the trial court where defense counsel made no attempt to subpoena the court reporter who transcribed the prior trial, where counsel made no showing as to why counsel failed to do so, and where there was thus no showing of "prejudice" constituting actual injury.
Ala.—Mallory v. State, 55 Ala. App. 82, 313 So. 2d 203 (Crim. App. 1975), writ denied, 294 Ala. 765, 313 So. 2d 208 (1975).
Guilty plea proceedings

A state rule limiting its requirement for verbatim transcripts of guilty-plea proceedings to cases in which a penitentiary sentence will result did not violate equal protection where there was no distinction between indigents and nonindigents.

U.S.—U. S. ex rel. Grundset v. Franzen, 675 F.2d 870 (7th Cir. 1982).

7 U.S.—Britt v. McKenney, 529 F.2d 44 (1st Cir. 1976); Faison v. Zahradnick, 563 F.2d 1135 (4th Cir. 1977).

Miss.—McHale v. State, 284 So. 2d 42 (Miss. 1973).

8 U.S.—U. S. ex rel. Cadogan v. LaVallee, 428 F.2d 165 (2d Cir. 1970).

9 Iowa—State v. Campbell, 215 N.W.2d 227 (Iowa 1974).

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6. Trial and Review

§ 1349. Appellate review

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3227, 3803 to 3806, 3813, 3814, 3816, 3817

When a state provides a right of appeal, it must meet the requirements of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

The equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution does not require a state to provide for appellate review in criminal cases.[1] However, when provided, an appeal must be in accordance with the constitutional guarantees of due process[2] and equal protection.[3] Thus, when a criminal appeal has been provided by a state, unfairness results only if a particular class of defendants are singled out by the state and denied meaningful access to the appellate system because of their membership in that class in violation of the Equal Protection Clause.[4]

Where a state has created appellate courts as an integral part of a trial system for finally adjudicating guilt or innocence of a defendant, the procedures used in deciding appeals must comport with due process and equal protection.[5] All persons must have the same opportunity to obtain appellate review,[6] and equal protection requires that a state appellate system be free of unreasoned distinctions which impede open and equal access to the courts.[7] Thus, when procedures enacted by a state serve to

deny one person a right of appeal that is granted to another, equal protection of the law is denied.[8] For example, a postconviction statute limiting the direct appeal rights of inmates in prison disciplinary cases and authorizing a right to proceed by writ of certiorari violates the equal protection rights of inmates where the State is still allowed a right of direct appeal.[9]

On the other hand, the State can, consistent with the Fourteenth Amendment, provide for differences in review of a conviction so long as the result does not amount to an invidious discrimination,[10] and absolute equality is not required.[11] Moreover, equal protection is not affected by a statute which grants different rights of appeal from different courts and in different classes of cases.[12] Furthermore, equal protection does not require an independent review of the record by the appellate court for additional issues not presented by counsel.[13]

Interlocutory appeal.

A statute providing for interlocutory appeals by the state in limited circumstances does not violate equal protection,[14] and a rule allowing only the prosecution to enter an interlocutory appeal does not deny a defendant equal protection rights.[15]

Bail pending appeal.

There is no constitutional right to a bond pending appeal, but once a state undertakes to establish a system for prisoners to be released on bail pending appeal, it must not violate equal protection or due process guarantees.[16] The rational basis test is applicable to a federal equal protection challenge of a statute denying release on bail pending appeal where the defendant has been convicted of designated serious crimes.[17]

A state's denial of bail pending appeal to recidivists is not a denial of equal protection where the defendant fails to show that such denial constitutes an unreasonable and arbitrary classification.[18] On the other hand, where bail pending appeal is precluded when a defendant is sentenced under a statute with a less severe minimum sentence, while under a statute with a more severe minimum sentence bail pending appeal is permitted, such a classification constitutes a denial of equal protection.[19]

Footnotes

1 Cal.—In re Drexel F., 58 Cal. App. 3d 801, 130 Cal. Rptr. 253 (5th Dist. 1976).
Or.—City of Klamath Falls v. Winters, 289 Or. 757, 619 P.2d 217 (1980).
Issues of law
Appellate jurisdiction limited to issues of law does not offend equal protection.
La.—State v. Fletcher, 341 So. 2d 340 (La. 1976).
No right to full appellate review; discretionary review procedure
A murder defendant who had been sentenced to life without mercy had no right to a full appellate review of the conviction, either as a matter of federal or state constitutional law, and West Virginia's discretionary review procedure did not violate due process or equal protection rights.
W. Va.—Billotti v. Dodrill, 183 W. Va. 48, 394 S.E.2d 32 (1990).

2 D.C.—Johnson v. U.S., 513 A.2d 798 (D.C. 1986).

3 U.S.—Register v. Thaler, 681 F.3d 623 (5th Cir. 2012).
Mo.—State v. Crabtree, 625 S.W.2d 670 (Mo. Ct. App. E.D. 1981).
Different defendants
Equal Protection Clause did not guarantee that defendants charged with committing different crimes and who had different trials were entitled to the same outcome on direct appeal.
Minn.—Dobbins v. State, 788 N.W.2d 719 (Minn. 2010).

Standard of review

Although strict scrutiny applies when a statute affects the right to bring appeal, the rational basis test applies to those portions of a statute that do not affect the fundamental right to appeal but merely regulate it.

Ariz.—State v. Ramirez, 178 Ariz. 116, 871 P.2d 237 (1994).

As to strict scrutiny of classifications involving fundamental rights, generally, see § 1277.

As to the rational basis test for violations of equal protection, generally, see § 1279.

4 U.S.—Hart v. MCI Concord Superintendent, 36 F. Supp. 3d 186 (D. Mass. 2014).

5 N.H.—State v. Cooper, 127 N.H. 119, 498 A.2d 1209 (1985).

Appeal from diversion order

Review of a pretrial order denying suppression of evidence was not available on appeal from a diversion order, following plea of guilty to misdemeanor possession of cannabis, since no judgment of conviction or order deemed to be a judgment of conviction existed upon which appellate review could be predicated, and the divertee was not denied equal protection of laws, since effect of diversion was merely to delay review of the search and seizure question until after a judgment of conviction was entered, should the divertee fail in the diversion program.

Cal.—People v. Bagby, 74 Cal. App. 3d 986, 141 Cal. Rptr. 762 (4th Dist. 1977).

Appellate delay

The right to a speedy appeal is not contemplated within the Sixth Amendment of the United States Constitution, although a defendant must be afforded equal protection and due process of law, and thus, appellate delay is not beyond scrutiny under the Federal Constitution.

Ind.—Allen v. State, 686 N.E.2d 760 (Ind. 1997).

Indefinite delay in imposition of sentence

Denial of the right of appeal from an original charge, caused by indefinite delay in the imposition of a sentence on a defendant who is found to be a sexual sociopath, offends the basic notion of equal protection of the law and cannot be permitted.

Neb.—State v. Shaw, 202 Neb. 766, 277 N.W.2d 106 (1979).

As to discrimination with respect to speedy trial rights in criminal proceedings, generally, see § 1328.

6 Ind.—Riner v. Raines, 274 Ind. 113, 409 N.E.2d 575 (1980).

Rule applicable to all appellants

There was no denial of due process or equal protection involved in the denial of a request to accept a late-filed application to reopen an appeal where the result of the decision was to apply a rule applicable to all appellants.

Ohio—State v. Winstead, 74 Ohio St. 3d 277, 1996-Ohio-52, 658 N.E.2d 722 (1996).

Failure to inform of right to appeal; actual knowledge of appeal rights

A state trial court's alleged failure to inform a defendant of the right to appeal and to appointed counsel on appeal does not violate the equal protection right of a defendant who is informed of appellate rights by an attorney or who has independent, actual knowledge of those rights.

U.S.—Novak v. Purkett, 4 F.3d 625 (8th Cir. 1993).

As to the equal protection right of indigents with respect to appeals, see § 1351.

7 U.S.—Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974); Blackledge v. Perry, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974).

8 Iowa—Shortridge v. State, 478 N.W.2d 613 (Iowa 1991).

9 Iowa—Shortridge v. State, 478 N.W.2d 613 (Iowa 1991).

10 U.S.—Douglas v. People of State of Cal., 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963).

Tex.—Ex parte Spring, 586 S.W.2d 482 (Tex. Crim. App. 1978).

11 U.S.—Douglas v. People of State of Cal., 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963).

Writ of error

The procedure in granting a writ of error to one convicted felon and refusing it to another convicted felon, based upon a merit review of each petition, does not violate the Equal Protection Clause.

Va.—Saunders v. Reynolds, 214 Va. 697, 204 S.E.2d 421 (1974).

12 Ga.—McIntyre v. State, 190 Ga. 872, 11 S.E.2d 5, 134 A.L.R. 813 (1940).

Capital cases

(1) Statute creating special appellate and postconviction procedure for capital cases, which established a statute of limitations for postconviction petitions, did not violate equal protection rights of petitioner for postconviction relief who was sentenced to death; the statute had a rational basis.
Idaho—Stuart v. State, 149 Idaho 35, 232 P.3d 813 (2010).
(2) Equal protection principles do not require the Supreme Court to give capital defendants the same sentence review afforded other felons under the determinate sentencing law.
Cal.—People v. McDowell, 54 Cal. 4th 395, 143 Cal. Rptr. 3d 215, 279 P.3d 547 (2012).

Equal right to due process

The State can create a system of inferior courts that treats similarly situated offenders differently but with substantial equality, and thus, the difference between a defendant's trial in municipal court, from which the defendant's appeal was limited to the record made in that court, and a trial in the justice of the peace court, from which the defendant would have had a right to a trial de novo on appeal, did not deny the defendant equal protection since the broader right of appeal from an unrecorded trial before a possibly lay justice of the peace did no more than guarantee an equal right to due process.
Tex.—Ex parte Spring, 586 S.W.2d 482 (Tex. Crim. App. 1978).

Court not of record

Procedure whereby one convicted of a misdemeanor in a court not of record is given an automatic appeal to a higher court, while a person convicted of a felony in a court of record has no automatic right of appeal to a higher court, does not violate equal protection in light of the fact that such a procedure is used to protect a misdemeanant's right to a trial by jury which is not provided in a court not of record.
Va.—Saunders v. Reynolds, 214 Va. 697, 204 S.E.2d 421 (1974).

13 Cal.—People v. Logan, 131 Cal. App. 3d 575, 182 Cal. Rptr. 543 (4th Dist. 1982).

14 Cal.—Anthony v. Superior Court, 109 Cal. App. 3d 346, 167 Cal. Rptr. 246 (4th Dist. 1980).
Kan.—State v. Burnett, 222 Kan. 162, 563 P.2d 451 (1977).

15 Colo.—People v. Traubert, 199 Colo. 322, 608 P.2d 342 (1980).

Denial of change of venue

There is no denial of equal protection to allow the State to appeal a denial of a motion for a change of venue but to refuse the defendant the same right since the State has no right to appeal following conviction or acquittal and allowance of an interlocutory appeal for review of orders respecting the place of trial, prior to conviction or acquittal, serves the public interest.
Mont.—State v. Armstrong, 189 Mont. 407, 616 P.2d 341 (1980).

16 Ga.—Browning v. State, 254 Ga. 478, 330 S.E.2d 879 (1985).

Requirement that bail be posted by defendant pending State's appeal

Since an indigent defendant is not always entitled to be released on the defendant's own recognizance and can be held in custody pending an appeal by the State if the defendant is unable to post bail, there is no denial of equal protection in requiring nonindigents to post bail in order to be released pending the state's appeal of an order granting suppression.
Fla.—State v. Shipman, 360 So. 2d 782 (Fla. 4th DCA 1978).

17 Alaska—Griffith v. State, 641 P.2d 228 (Alaska Ct. App. 1982).
Okla.—Spitznas v. State, 1982 OK CR 115, 648 P.2d 1271 (Okla. Crim. App. 1982).

18 U.S.—U. S. ex rel. Klein v. Deegan, 290 F. Supp. 66 (S.D. N.Y. 1968).
Fla.—Gallie v. Wainwright, 362 So. 2d 936 (Fla. 1978).

19 N.Y.—People v. Gonzalez, 402 N.Y.S.2d 584 (App. Div. 2d Dep't 1978).

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16B C.J.S. Constitutional Law § 1350

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

6. Trial and Review

§ 1350. Appellate review—Plea of guilty or nolo contendere

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3227, 3803 to 3806, 3813, 3814, 3816, 3817

A rational basis exists for the distinction made by a rule which establishes different procedural requisites for defendants who appeal after being convicted by a jury as opposed to defendants who appeal after a guilty plea or a plea of nolo contendere.

A statute which precludes any direct appeal from a guilty plea and limits a defendant's recourse to a collateral attack upon the conviction as the initial means of review does not violate equal protection.[1] A rule of procedure providing that notice of a right of review must be given to criminal defendants except in cases where a judgment of conviction has been entered following a plea of guilty or nolo contendere likewise does not violate equal protection.[2]

The preconditions for an appeal by a defendant who has pleaded guilty, under which it is not enough for the defendant to allege that no appeal was taken because counsel failed to file a timely notice, but rather, it must appear that during the time allowed for taking an appeal the defendant disputed the validity of the judgment of conviction but was prevented from prosecuting the appeal and that at that time the defendant had a genuine appealable issue which might have been raised are not defective on equal protection grounds.[3]

Footnotes

1 Fla.—Robinson v. State, 373 So. 2d 898 (Fla. 1979).
As to the rational basis test for violations of equal protection, generally, see § 1279.

2 Colo.—People v. Smith, 190 Colo. 449, 548 P.2d 603 (1976).

3 U.S.—Micelli v. LeFevre, 444 F. Supp. 1187 (S.D. N.Y. 1978).

16B C.J.S. Constitutional Law § 1351

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

6. Trial and Review

§ 1351. Appellate review—Indigent defendants

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3227, 3803 to 3806, 3813, 3814, 3816, 3817

Equal protection of the law is not satisfied where the nature of appellate review, or the presence or absence of review, of a person's conviction depends upon the amount of money the person has.

Equal protection of the law is not satisfied where the nature of appellate review, or the presence or absence of review, of a person's conviction depends upon the amount of money the person has.[1] Thus, a state that grants appellate review of criminal convictions cannot do so in a way that discriminates against some convicted defendants on account of their poverty.[2] Any action or omission on the part of a state or any of its officers which, in effect, denies a defendant an appellate review because of poverty constitutes a violation of equal protection.[3]

The Equal Protection Clause requires that a state appellate system be free of unreasoned distinctions with respect to indigents and that indigents have an adequate opportunity to present their claims within an adversarial system.[4]

Rights to transcript and representation by counsel.

The Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution guarantee a variety of rights to indigents on appeal, including the right to counsel at the expense of the state, the right to a free transcript, and the right to effective assistance of counsel.[5] Under the Equal Protection Clause, destitute defendants must be afforded as adequate an appellate review as defendants who have enough money to buy transcripts.[6] Thus, where convicted defendants are without the means of paying the necessary fees to acquire a transcript and court records needed to prosecute an appeal, the denial of a motion that a copy of the record, including a stenographic transcript, be furnished them without cost is a denial of equal protection.[7]

Where a state creates an appellate procedure in criminal matters, the Fourteenth Amendment mandates that an indigent criminal defendant be afforded equal rights to appeal through the representation and advocacy of assigned counsel.[8] The only limitation on this constitutional right is that it does not include the right to bring a frivolous appeal and, concomitantly, does not include the right to counsel for bringing a frivolous appeal.[9]

Indigent, noncapital postconviction petitioners are not constitutionally entitled to expert support services at state expense under the equal protection principles.[10]

Footnotes

1 U.S.—Douglas v. People of State of Cal., 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963).
Ky.—Lay v. Com., 506 S.W.2d 507 (Ky. 1974).
Due process and equal protection rights
As a practical matter, the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution largely converge to require that a state's procedure affords adequate and effective appellate review to indigent defendants, and a state's procedure provides such review so long as it reasonably ensures that an indigent's appeal will be resolved in a way that is related to the merit of that appeal.
U.S.—Smith v. Robbins, 528 U.S. 259, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000).
Advisement of right to appeal
Where an appeal exists as a matter of right, it is a denial of equal protection for an indigent defendant to be denied that right because the defendant was not advised of the right to appeal.
Okla.—Jewell v. Tulsa County, 1969 OK CR 54, 450 P.2d 833 (Okla. Crim. App. 1969).

2 U.S.—Mayer v. City of Chicago, 404 U.S. 189, 92 S. Ct. 410, 30 L. Ed. 2d 372 (1971).
N.Y.—People v. Rivera, 39 N.Y.2d 519, 384 N.Y.S.2d 726, 349 N.E.2d 825 (1976).

3 Ark.—Brown v. Taylor, 245 Ark. 435, 432 S.W.2d 751 (1968).
Denial of full-scale appellate review
(1) The trial judge's conclusion that there was no reversible error in a trial cannot be an adequate substitute for the right to full appellate review available to all defendants in a state who can afford the expense of a transcript.
U.S.—Eskridge v. Washington State Bd. of Prison Terms and Paroles, 357 U.S. 214, 78 S. Ct. 1061, 2 L. Ed. 2d 1269 (1958).
(2) Deferential scrutiny, rather than strict scrutiny, applied in determining whether the Appellate Division's excessive-sentence oral-argument program, which created a subclass of indigent defendants, all of whom were denied a full-scale appellate review in excess-sentence appeals, violated the defendants' right to equal protection.
N.J.—State v. Bianco, 103 N.J. 383, 511 A.2d 600 (1986).
As to strict scrutiny of classifications involving fundamental rights, generally, see § 1277.
As to the rational basis test for violations of equal protection, generally, see § 1279.

4 U.S.—Ross v. Moffitt, 417 U.S. 600, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974).
N.C.—State v. McNeill, 33 N.C. App. 317, 235 S.E.2d 274 (1977).
Financial barriers

Imposition by a state of financial barriers restricting availability of appellate review for indigent criminal defendants is a denial of equal protection of the law.

U.S.—Smith v. Bennett, 365 U.S. 708, 81 S. Ct. 895, 6 L. Ed. 2d 39 (1961).

5 N.H.—State v. Cooper, 127 N.H. 119, 498 A.2d 1209 (1985).

Basic tools of adequate appeal required

A state must, as a matter of equal protection, provide indigent defendants with the basic tools of an adequate appeal when those tools are available for a price to other defendants.

U.S.—Britt v. North Carolina, 404 U.S. 226, 92 S. Ct. 431, 30 L. Ed. 2d 400 (1971).

6 U.S.—Lane v. Brown, 372 U.S. 477, 83 S. Ct. 768, 9 L. Ed. 2d 892 (1963).

W. Va.—Call v. McKenzie, 159 W. Va. 191, 220 S.E.2d 665 (1975).

Unreasoned distinction; limitation to felony cases

The distinction drawn by a court rule which provided trial transcripts only in felony cases was an "unreasoned distinction" proscribed by the Fourteenth Amendment.

U.S.—Mayer v. City of Chicago, 404 U.S. 189, 92 S. Ct. 410, 30 L. Ed. 2d 372 (1971).

Cal.—In re Armstrong, 126 Cal. App. 3d 565, 178 Cal. Rptr. 902 (1st Dist. 1981).

As to the right of indigents to free transcripts of prior criminal proceedings, generally, see § 1348.

7 U.S.—Long v. District Court of Iowa, In and For Lee County, Fort Madison, Iowa, 385 U.S. 192, 87 S. Ct. 362, 17 L. Ed. 2d 290 (1966); U. S. ex rel. Cleveland v. Warden, New Jersey State Prison, 544 F.2d 1200 (3d Cir. 1976).

N.C.—State v. McNeill, 33 N.C. App. 317, 235 S.E.2d 274 (1977).

Right to transcript in postconviction proceedings

(1) Under a federal statute governing furnishing of free transcripts to plaintiffs in certain actions, the decision as to provision of transcript at public expense is made initially by a district judge in the judicial district in which the petitioner was tried, and the district court has the power to order a free transcript furnished if it finds that the suit is not frivolous and that the transcript is needed to decide the issue presented; the formula devised by Congress satisfies the equal protection components of Fifth Amendment.

U.S.—U. S. v. MacCollom, 426 U.S. 317, 96 S. Ct. 2086, 48 L. Ed. 2d 666 (1976).

(2) The Fifth Amendment of the United States Constitution did not require that an indigent defendant be provided a free transcript, for use in attacking a conviction collaterally in a habeas corpus proceeding, where such a transcript was available to the defendant on direct appeal.

U.S.—Watts v. State of Tenn., 603 F. Supp. 494 (M.D. Tenn. 1984), order aff'd, 746 F.2d 1481 (6th Cir. 1984).

(3) As matter of constitutional equal protection, an indigent criminal defendant is entitled to a free transcript of prior proceedings when that transcript is needed for an effective defense or appeal, but an indigent criminal defendant is not entitled, either as matter of equal protection or of due process, to free transcription of prior proceedings for use in pursuing postconviction habeas corpus relief.

Tex.—Escobar v. State, 880 S.W.2d 782 (Tex. App. Houston 1st Dist. 1993).

8 N.Y.—People v. Stokes, 95 N.Y.2d 633, 722 N.Y.S.2d 217, 744 N.E.2d 1153 (2001).

Appointment of counsel in petitioning Supreme Court for certiorari

An indigent capital murder defendant is entitled to have the court-appointed counsel appointed as appellate counsel, at county expense, for petitioning the United States Supreme Court for certiorari, after the defendant's conviction and death sentence have been affirmed by the state's highest court, where the public defender's office seeks certiorari review in all death-sentence cases and the defendant was represented at trial by appointed counsel solely because of the public defender's excessive case load.

Fla.—Green v. State, 620 So. 2d 188 (Fla. 1993).

9 N.Y.—People v. Stokes, 95 N.Y.2d 633, 722 N.Y.S.2d 217, 744 N.E.2d 1153 (2001).

10 Tenn.—Davis v. State, 912 S.W.2d 689 (Tenn. 1995).

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

7. Sentence and Punishment

§ 1352. Law governing sentences and punishments

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3106, 3132, 3227, 3243, 3377, 3788, 3792, 3808 to 3811, 3813, 3818

The constitutional guarantee of equal protection prohibits a state from enacting statutes which prescribe different punishments or different degrees of punishment for the same acts, committed under like circumstances by persons similarly situated, and requiring the same proof.

The constitutional guarantee of equal protection generally prohibits the State from enacting statutes which prescribe different punishments or different degrees of punishment for the same acts committed under like circumstances by persons similarly situated, and requiring the same proof,[1] but not where at least one element of the crimes differs[2] or where reasonable distinctions can be drawn between the statutes.[3] Persons convicted of different crimes are not similarly situated and, therefore, may be subjected to different penalties without implicating equal protection concerns.[4]

In prescribing and fixing the punishment for a crime, the legislature has a great latitude of discretion in classifying the same with reference to the heinousness and gravity of the act or acts constituting the crime.[5] The legislature may feel that a greater penalty under a statute, as opposed to a penalty prescribed for apparently more serious offenses, is required as a deterrent since the conduct denounced in the statute is more likely to occur than that denounced in other statutes.[6]

Generally, the law with respect to the punishment to be inflicted for a crime must operate equally on every citizen or inhabitant of the state.[7] However, the legislature may provide a special punishment for a special class of offenders.[8]

Where criminal conduct is prohibited by two different statutes, which provide different penalties, there is no denial of equal protection in the prosecution of the accused under the statute which provides the greater penalty so long as there is no discriminatory classification between similarly situated persons.[9]

Punishments applicable only to prisoners or convicts.

A legislature may, without violating equal protection, provide for punishments applicable only to prisoners or convicts, such as by passing statutes punishing the crime of escape.[10] A statute which provides a harsher punishment for escape from incarceration upon an escaped felon than upon an escaped misdemeanant does not deny an escapee equal protection,[11] nor does a statute requiring the imposition of an equal punishment for escape by persons charged with a felony and escape by persons convicted of a felony.[12]

Footnotes

1 Ala.—Opinion of the Justices, 410 So. 2d 60 (Ala. 1982).
Minn.—State v. Frazier, 649 N.W.2d 828 (Minn. 2002).
As to equal protection with respect to the nature and extent of sentences, generally, see § 1353.

2 U.S.—Klingler v. Erickson, 328 F. Supp. 674 (D.S.D. 1971).
Colo.—People v. Thatcher, 638 P.2d 760 (Colo. 1981).
Tex.—Powell v. State, 632 S.W.2d 842 (Tex. App. Houston 14th Dist. 1982).
Different mens rea
In view of the fact that a manslaughter statute requires that one "recklessly" cause a death, while a second-degree murder statute requires an "intent to cause serious bodily injury," a different mens rea is required for each offense and, therefore, the statutes do not violate equal protection by punishing the same conduct by two different penalties.

3 Colo.—People v. Westrum, 624 P.2d 1302 (Colo. 1981); People v. Gibson, 623 P.2d 391 (Colo. 1981).
Ind.—Rector v. State, 264 Ind. 78, 339 N.E.2d 551 (1976).
Equal protection not violated
(1) A sentencing statute that punishes conduct involving base or crack cocaine more severely than powder cocaine does not violate the Equal Protection Clause despite any disparate impact on African-Americans.
U.S.—U.S. v. Smith, 82 F.3d 241 (8th Cir. 1996); U.S. v. White, 81 F.3d 80 (8th Cir. 1996).
(2) Statutes providing greater penalties for offenses involving methamphetamine than for offenses involving other hard drugs did not violate equal protection since the statutes addressed the increase in manufacture and use of methamphetamine.
Iowa—State v. Biddle, 652 N.W.2d 191 (Iowa 2002).
(3) The availability of certain procedural protections in noncapital sentencing, such as a burden of proof, written findings, jury unanimity, and disparate sentence review, when those same protections are unavailable in capital sentencing, does not signify that California's death penalty statute violates Fourteenth Amendment equal protection principles.
Cal.—People v. Hajek, 58 Cal. 4th 1144, 171 Cal. Rptr. 3d 234, 324 P.3d 88 (2014), cert. denied, 135 S. Ct. 1399 (2015) and cert. denied, 135 S. Ct. 1400 (2015).

4 Mont.—State v. Egdorf, 2003 MT 264, 317 Mont. 436, 77 P.3d 517 (2003).
Different punishment for different offenses not precluded
The legislature is not precluded by principles of equal protection from adopting different punishment alternatives for different offenses.

Ill.—People v. Blackorby, 146 Ill. 2d 307, 166 Ill. Dec. 902, 586 N.E.2d 1231 (1992).

5 Ala.—State v. Spurlock, 393 So. 2d 1052 (Ala. Crim. App. 1981).

Ill.—People v. White, 86 Ill. App. 3d 19, 41 Ill. Dec. 74, 407 N.E.2d 572 (1st Dist. 1980).

6 Cal.—People v. Romo, 14 Cal. 3d 189, 121 Cal. Rptr. 111, 534 P.2d 1015 (1975).

7 Ala.—Opinion of the Justices, 410 So. 2d 60 (Ala. 1982).

Necessity of difference among those similarly situated

(1) There must be a showing that all first offenders sentenced to life imprisonment, that is, all those similarly situated, are not treated equally.

La.—State v. Ross, 304 So. 2d 354 (La. 1974).

(2) In the absence of a showing that other trial courts permitted other persons convicted of their first drunk driving offense to choose either to attend school or to go to an assessment for treatment in lieu of revocation of their operating privileges, a defendant who was not given that option was not deprived of equal protection.

Wis.—City of Prairie Du Chien v. Evans, 100 Wis. 2d 358, 302 N.W.2d 61 (Ct. App. 1981).

Statutory exemption of drug-dependent persons

A statutory exemption of drug-dependent persons from a statute imposing a mandatory minimum sentence for possession of cocaine with the intent to sell did not violate equal protection.

Conn.—State v. Grullon, 212 Conn. 195, 562 A.2d 481 (1989).

No right to dissimilar treatment based upon dissimilar situation shown

A statute providing for an enhanced penalty for distribution of a controlled substance for value within 1,000 feet of a public school did not violate equal protection on the ground that it treated drug dealers in small towns differently from those in large cities; the fact that a defendant resided in a small city and that, consequently, a school yard could be more readily located within 1,000 feet of the defendant's residence and the defendant's drug-dealing activities than was the case with drug dealers in larger cities did not render the defendant dissimilarly situated so as to entitle the defendant to dissimilar treatment.

Utah—State v. Moore, 782 P.2d 497 (Utah 1989).

8 U.S.—Lambdin v. Superintendent, California Correctional Inst., Tehachapi, Cal., 640 F.2d 245 (9th Cir. 1981).

Ala.—State v. Spurlock, 393 So. 2d 1052 (Ala. Crim. App. 1981).

Tenn.—State v. Taylor, 628 S.W.2d 42 (Tenn. Crim. App. 1981).

Offenders using a firearm in the commission of a crime or felony

Iowa—State v. Holmes, 276 N.W.2d 823 (Iowa 1979).

Kan.—State v. Hutchison, 228 Kan. 279, 615 P.2d 138 (1980).

DNA testing of persons convicted of violent crimes or sex offenses

A statute requiring involuntary DNA tests of convicted offenders of violent or sex offenses did not violate equal protection.

Wash.—State v. Olivas, 122 Wash. 2d 73, 856 P.2d 1076 (1993).

As to strict scrutiny of classifications involving fundamental rights, generally, see § 1277.

As to the rational basis test for violations of equal protection, generally, see § 1279.

As to strict scrutiny of suspect classifications based on race, ethnicity, or creed, see § 1282.

As to the application of equal protection principles with respect to habitual offender and similar statutes, see § 1355.

9 U.S.—U. S. v. Batchelder, 442 U.S. 114, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979).

Under state constitution

When two statutes provide different penalties for identical conduct, the guarantee of equal protection under the state constitution is violated if a defendant is convicted and sentenced under the harsher statute, and equal protection principles may be violated where two statutes proscribe different conduct, yet offer no intelligible standard for distinguishing the conduct.

Colo.—People v. Goodale, 78 P.3d 1103 (Colo. 2003).

10 Iowa—State v. Conner, 314 N.W.2d 427 (Iowa 1982).

11 Fla.—Rebon v. State, 203 So. 2d 202 (Fla. 2d DCA 1967).

12 Iowa—State v. Conner, 314 N.W.2d 427 (Iowa 1982).

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

7. Sentence and Punishment

§ 1353. Nature and extent of sentence

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3106, 3132, 3227, 3243, 3377, 3788, 3792, 3808 to 3811, 3813, 3818

Although the constitutional guarantee of equal protection of the law requires substantially the same sentence for substantially the same case histories, it does not preclude different sentences for persons convicted of the same crime based upon their individual culpability and need for rehabilitation.

Although the constitutional guarantee of equal protection of the law requires substantially the same sentence for substantially the same case histories, it does not preclude different sentences for persons convicted of the same crime based upon their individual culpability and need for rehabilitation.[1] The fact that a sentencing scheme permits another defendant guilty of the same crime to receive a lesser sentence is not necessarily a reason for declaring the law unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.[2] Judicial discretion naturally leads to discrepancies in sentencing, and even wide sentencing discretion in the abstract is not a violation of due process or equal protection since the issue is the appropriateness of the sentence given the defendant's crime.[3] Thus, a violation of the equal protection guaranty does not result where the judge or the jury in the exercise of discretion assesses different punishments on different persons, including codefendants or accomplices, for the commission of the same or similar acts.[4]

Equal protection principles do not require the Supreme Court to give capital defendants the same sentence review afforded other felons under the determinate sentencing law.[5]

There is no violation of equal protection when the court, in sentencing a defendant, gives weight to legitimate factors such as the deterrence of future crimes, the isolation of the offender from society, and the accountability of an individual for antisocial deeds.[6] Moreover, consideration of an accused's prior convictions in the sentencing phase of a case does not violate the accused's equal protection rights.[7]

A finding that there has been a denial of equal protection in sentencing must rest upon a conclusion that the disparity is arbitrary or based upon considerations not pertinent to proper sentencing discretion.[8] Thus, before differing treatment in sentencing falls under the constitutional proscription against the denial of equal protection, there must be proof of intentional or purposeful discrimination.[9]

Credit towards time spent in custody.

Statutes concerning credit towards a prisoner's sentence for time spent in custody do not violate equal protection where whatever disparate treatment is provided has a rational basis.[10]

Resentencing.

The constitutional guarantee of equal protection does not impose an absolute bar to a more severe sentence being imposed upon a reconviction of a defendant whose original sentence has been set aside at the behest of the defendant.[11]

CUMULATIVE SUPPLEMENT

Cases:

Imposition of mandatory recidivist enhancement when sentencing defendant for federal narcotics offense, based upon fact that she committed offense after being finally convicted of state felony drug offense, did not violate her equal protection rights, despite fact that, due to California's reclassification of state drug offense of which defendant was convicted from felony to misdemeanor, defendants who were convicted of that same offense following this reclassification would not be subject to recidivist enhancement if they thereafter committed federal drug felony; such disparate results were inevitable, since whenever a sentencing statute is amended, someone, in the end, will always be left behind to live with the earlier, harsher penalty. U.S. Const. Amend. 5; Comprehensive Drug Abuse Prevention and Control Act of 1970 § 401(b)(1)(B), 21 U.S.C.A. § 841(b)(1)(B); Cal. Penal Code § 1170.18. United States v. Sanders, 909 F.3d 895 (7th Cir. 2018).

[END OF SUPPLEMENT]

Footnotes

1 Wis.—Drinkwater v. State, 73 Wis. 2d 674, 245 N.W.2d 664 (1976).
Mere disparity in sentences not denial of equal protection
Wis.—Ocanas v. State, 70 Wis. 2d 179, 233 N.W.2d 457 (1975).
Equal sentences not mandated
U.S.—Wilson v. Cox, 312 F. Supp. 209 (W.D. Va. 1970).

Mich.—People v. Dupuie, 52 Mich. App. 510, 217 N.W.2d 902 (1974).

2 W. Va.—State ex rel. Appleby v. Recht, 213 W. Va. 503, 583 S.E.2d 800 (2002).

3 W. Va.—State ex rel. Appleby v. Recht, 213 W. Va. 503, 583 S.E.2d 800 (2002).

Individualization of sentencing

Equality of treatment does not destroy individualization of sentencing to fit the crime and individual, and persons convicted of the same crime can constitutionally be given different sentences.

Ariz.—State v. Maloney, 105 Ariz. 348, 464 P.2d 793 (1970).

4 Cal.—People v. Rousseau, 129 Cal. App. 3d 526, 179 Cal. Rptr. 892 (1st Dist. 1982).

Ill.—People v. DeSimone, 108 Ill. App. 3d 1015, 64 Ill. Dec. 503, 439 N.E.2d 1311 (2d Dist. 1982).

Mont.—State v. Herrera, 197 Mont. 462, 643 P.2d 588 (1982).

5 Cal.—People v. Kelly, 42 Cal. 4th 763, 68 Cal. Rptr. 3d 531, 171 P.3d 548 (2007), as modified, (Feb. 20, 2008).

6 U.S.—U.S. v. Moss, 631 F.2d 105 (8th Cir. 1980).

S.D.—Clark v. State, 294 N.W.2d 916 (S.D. 1980).

Differences based on plea entered

Rational basis test, rather than strict scrutiny, applied in determining whether statute allowing a district court to accept a plea of guilty or nolo contendere to third-offense driving under the influence (DUI) and subsequently enter a judgment for a second-offense DUI if the offender successfully completes a treatment program violated defendant's equal protection rights as the statute did not penalize a defendant for exercising the fundamental right to a jury trial.

Nev.—Aguilar-Raygoza v. State, 255 P.3d 262, 127 Nev. Adv. Op. No. 27 (Nev. 2011).

Protection of society

A defendant's sentence of 20 years for conviction of attempted escape from lawful custody did not violate the Equal Protection Clause of the Fourteenth Amendment since the State showed a rational relationship between the statute and the government objective of protection of society.

Okla.—Tyler v. State, 1989 OK CR 31, 777 P.2d 1352 (Okla. Crim. App. 1989).

As to the rational basis test for violations of equal protection, generally, see § 1279.

7 Okla.—Rutledge v. State, 1974 OK CR 191, 527 P.2d 1373 (Okla. Crim. App. 1974).

Conversion to determinate sentence

A statute providing a window to allow indeterminate sentences of parolees to be converted into a determinate sentence when the parolee commits a new crime, but not for a technical parole violation, did not violate the equal protection rights of an inmate who committed a technical violation of parole after the window period.

Kan.—State v. Mueller, 271 Kan. 897, 27 P.3d 884 (2001).

Look-back period

Provision which tolled a 10-year look-back period, while a person is incarcerated, used to determine if a prior conviction qualified as a predicate violent felony, did not violate a defendant's right to equal protection; it was rational to omit periods of incarceration from the look-back period, as society had interest in treating differently individuals who demonstrated good behavior during the time in which they were released and living in society from those who could not.

N.Y.—People v. Meckwood, 20 N.Y.3d 69, 956 N.Y.S.2d 453, 980 N.E.2d 501 (2012).

Unadjudicated offenses

Evidence of unadjudicated, extraneous rape offenses admitted at the punishment phase of a prosecution for capital murder did not deprive the defendant of equal protection, absent a showing of unfair surprise.

Tex.—Williams v. State, 622 S.W.2d 116 (Tex. Crim. App. 1981).

As to equal protection violations with respect to parole, generally, see § 1364.

8 Wis.—Ocanas v. State, 70 Wis. 2d 179, 233 N.W.2d 457 (1975).

Wyo.—Cavanagh v. State, 505 P.2d 311 (Wyo. 1973).

9 Ariz.—State v. Ovante, 231 Ariz. 180, 291 P.3d 974 (2013), cert. denied, 134 S. Ct. 86, 187 L. Ed. 2d 66 (2013).

N.H.—State v. Wentworth, 118 N.H. 832, 395 A.2d 858 (1978).

Antagonism toward civil disobedience

Absent any indication in the record that a three-month sentence imposed upon a defendant convicted of criminal trespass in connection with the occupation of a nuclear power plant site was based upon antagonism toward civil disobedience, the sentence did not violate equal protection.

N.H.—State v. Koski, 120 N.H. 112, 411 A.2d 1122 (1980).

National origin

In imposing sentence upon a defendant convicted of grand larceny, the trial court violated the defendant's equal protection rights by refusing to consider a deferred or suspended sentence solely because the defendant was an Iranian national.

Okla.—Kalbali v. State, 1981 OK CR 139, 636 P.2d 369 (Okla. Crim. App. 1981).

10 U.S.—Haag v. Ward, 632 F.2d 206 (2d Cir. 1980).

Cal.—In re Taylor, 132 Cal. App. 3d 260, 183 Cal. Rptr. 34 (2d Dist. 1982).

No violation of equal protection shown

A defendant, whose original sentence was recalled for correction, was not similarly situated to a pretrial detainee, and thus, the failure to award presentence-conduct credits for time spent in prison and in the county jail between the original sentencing hearing and the resentencing hearing did not violate the defendant's right to equal protection of the laws.

Cal.—People v. Johnson, 32 Cal. 4th 260, 8 Cal. Rptr. 3d 761, 82 P.3d 1244 (2004).

Credit for time spent on bail release not warranted

A defendant who was released on bail subject to the conditions that the defendant generally "remain at home," unless engaged in business pertaining to the case or in a place of employment, and that the defendant have regular contacts with own recognizance project was not similarly situated to participants in an electronic home monitoring program so as to be entitled to a presentence custody credit for time spent on bail release as a matter of equal protection; the defendant's confinement to the defendant's home was not as custodial as the confinement of the participants in the electronic home monitoring program.

Cal.—People v. Pottorff, 47 Cal. App. 4th 1709, 55 Cal. Rptr. 2d 536 (1st Dist. 1996).

Irrational classification

Statutes authorizing the commissioner of corrections to refuse to credit time served prior to sentencing if a detainee failed to obey the rules of the institution violated equal protection on the ground that they were underinclusive in that they did not reach all prisoners who did not conform to the rules of the institution but only detainees; the statutes thus created an irrational classification, since persons who secured a remand on appeal were placed in a better position than those awaiting trial, and persons eventually acquitted were not reached.

Conn.—Laden v. Warden, Connecticut Correctional Inst., 169 Conn. 540, 363 A.2d 1063 (1975).

As to the applicability of equal protection principles with respect to good-time credits, see § 1363.

11 U.S.—Chaffin v. Stynchcombe, 455 F.2d 640 (5th Cir. 1972), judgment aff'd, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973).

Okla.—Jerry v. State, 1972 OK CR 77, 496 P.2d 422 (Okla. Crim. App. 1972).

As to equal protection as applied to resentencing to the death penalty, generally, see § 1354.

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Constitutional Law
Francis C. Amendola, J.D.; Joseph Bassano, J.D.; John Bourdeau, J.D.; M. Elaine Buccieri, J.D.; James Buchwalter, J.D.; Michael N. Giuliano, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; Jill Gustafson, J.D.; Glenda K. Harnad, J.D.; Alan J. Jacobs, J.D.; John Kimpflen, J.D.; Amy L. Kruse, J.D.; Stephen Lease, J.D.; Sonja Larsen, J.D.; Robert B. McKinney, J.D., of the staff of the National Legal Research Group, Inc.; Mary Babb Morris, J.D., of the staff of the National Legal Research Group, Inc.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Thomas Muskus, J.D.; Sally J.T. Necheles, J.D., LL.M.; Karl Oakes, J.D. and Eric C. Surette, J.D.

PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

7. Sentence and Punishment

§ 1354. Death penalty or life imprisonment

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3106, 3132, 3227, 3243, 3377, 3788, 3792, 3808 to 3811, 3813, 3818

Generally, imposition of the death penalty under a capital-murder statute does not violate the constitutional guarantee of equal protection.

Imposition of the death penalty under a capital-murder statute generally does not violate the constitutional guarantee of equal protection.[1] Where all persons in a state charged with murder in the first degree face possible imposition of the death penalty, the fact that one defendant receives the death penalty does not violate equal protection even though other individuals do not since equality of treatment does not destroy individualization of sentencing to fit the crime and the individual.[2]

A death penalty statute does not violate the constitutional guarantee of equal protection when it is not applied in a discriminatory or arbitrary fashion against particular classifications or categories of individuals.[3] On the other hand, imposing a mandatory death penalty for a prison inmate who is convicted of murder while serving a life sentence without the possibility of parole violates the Eighth and Fourteenth Amendments of the United States Constitution since an inmate's life-term status is insufficient to justify departure from the individualized capital-sentencing doctrine.[4]

Burden of proof.

A defendant who alleges an equal protection violation with respect to the imposition of the death sentence has the burden of demonstrating either a discriminatory intent or a discriminatory effect.[5] To show a discriminatory effect in the imposition of death sentences, for purposes of establishing an equal protection violation, the defendant must demonstrate that similarly situated individuals were treated differently.[6]

Natural life imprisonment.

A sentence of natural life imprisonment is not violative of equal protection.[7]

CUMULATIVE SUPPLEMENT

Cases:

California's death penalty law does not violate equal protection principles notwithstanding that noncapital defendants are entitled to certain procedural protections, such as the requirement the sentencer provide written reasons justifying the sentence, that are not available to capital defendants. U.S.C.A. Const.Amend. 14. People v. Casares, 62 Cal. 4th 808, 198 Cal. Rptr. 3d 167, 364 P.3d 1093 (2016).

Capital and noncapital defendants are not similarly situated and therefore may be treated differently without violating constitutional guarantees of equal protection of the laws, due process of law, or the cruel and unusual punishment clause. U.S.C.A. Const.Amends. 8, 14. People v. Williams, 61 Cal. 4th 1244, 192 Cal. Rptr. 3d 266, 355 P.3d 444 (2015).

Imposition of a mandatory sentence of life in prison without the possibility of parole on defendant with developmental disabilities did not violate either the State or Federal constitutions' prohibition against cruel and unusual punishment; while the United States Supreme Court determined in *Atkins* that intellectually disabled individuals have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others, leading them to be less culpable than other offenders, defendant was diagnosed with a developmental disability, rather than an intellectual disability. U.S. Const. Amend. 8; Mass. Const. pt. 1, art. 26; Mass. Gen. Laws Ann. ch. 123, § 15(b), (c), and (d). Commonwealth v. Jones, 479 Mass. 1, 90 N.E.3d 1238 (2018).

[END OF SUPPLEMENT]

Footnotes

1 Fla.—Ferguson v. State, 417 So. 2d 639 (Fla. 1982); Ferguson v. State, 417 So. 2d 631 (Fla. 1982).
Va.—Stamper v. Com., 220 Va. 260, 257 S.E.2d 808 (1979).
Prosecutorial latitude
A death-sentence scheme did not violate the Equal Protection Clause of the Fourteenth Amendment by providing unconstitutional latitude to the prosecution in deciding whether to seek the death penalty.
Wash.—State v. Benn, 120 Wash. 2d 631, 845 P.2d 289 (1993).
Statute precluding reconsideration of death sentence

A statute precluding the trial judge from reconsidering or modifying a death sentence imposed pursuant to a jury determination does not violate equal protection; while a noncapital defendant is entitled, upon timely request, to reconsideration of the sentence, a capital defendant is entitled to numerous other safeguards.
Md.—Burch v. State, 358 Md. 278, 747 A.2d 1209 (2000).

Imposition of death penalty following retrial

Provisions of the state constitution regarding double jeopardy, the right of appeal, due process, and equal protection did not bar the prosecution from seeking the death penalty on retrial of a defendant for first-degree murder where a life sentence was imposed in the first trial due to the inability of the jury to agree on a penalty.
Pa.—Com. v. Sattazahn, 563 Pa. 533, 763 A.2d 359 (2000), judgment aff'd, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003).

2 Ariz.—State v. Maloney, 105 Ariz. 348, 464 P.2d 793 (1970).

No violation of equal protection shown

A prosecutor did not violate equal protection by only seeking the death penalty in the case of a native American defendant, given differences between the defendant's case and that of a codefendant; the prosecution withdrew the notice of intent to seek the death penalty against the codefendant only after the codefendant pleaded guilty to two counts of aggravated first-degree murder, to which the defendant did not attempt to plead guilty, and there was a reference in the record to mitigating evidence in the codefendant's case.
Wash.—State v. Rice, 120 Wash. 2d 549, 844 P.2d 416 (1993).

Classification not arbitrary or unreasonable

A death-penalty statute did not arbitrarily limit application of the death sentence to individuals who did not require special provisions or assistance in order to be fit to stand trial, as would have constituted a violation of the Eighth and Fourteenth Amendments; the exemption for defendants so extensively impaired they could not understand the nature and purpose of proceedings against them, despite special assistance, was not an arbitrary or unreasonable classification.
Ill.—People v. Young, 128 Ill. 2d 1, 131 Ill. Dec. 86, 538 N.E.2d 461 (1989).

Rational relationship shown

A statutory classification, under which the fact that a defendant convicted of first-degree murder has previously been convicted of an offense punishable by life imprisonment or death is an aggravating circumstance to be considered in determining whether to assess the death penalty but a prior conviction of other arguably more serious offenses is not an aggravating circumstance, does not deny equal protection, in that the classification has a rational relation to the statutory purpose of giving sentencing judges information deemed relevant to punishment for first-degree murder.
Ariz.—State v. Arnett, 119 Ariz. 38, 579 P.2d 542 (1978).

As to the rational basis test for violations of equal protection, generally, see § 1279.

3 Ark.—Neal v. State, 261 Ark. 336, 548 S.W.2d 135 (1977).

Capital defendants not similarly situated to other defendants

(1) A capital defendant in the penalty phase is not similarly situated to other criminal defendants for equal protection purposes.
Cal.—People v. Roberts, 2 Cal. 4th 271, 6 Cal. Rptr. 2d 276, 826 P.2d 274 (1992), as modified on denial of reh'g, (May 20, 1992).

(2) Defendants sentenced under a determinate sentencing law were not, for equal protection purposes, similarly situated to defendants sentenced in the capital system.
U.S.—Allen v. Woodford, 395 F.3d 979 (9th Cir. 2005).

(3) Because capital defendants are not similarly situated to noncapital defendants, California does not deny capital defendants equal protection by providing certain procedural protections to noncapital defendants that are not provided to capital defendants.
Cal.—People v. Jones, 54 Cal. 4th 1, 140 Cal. Rptr. 3d 383, 275 P.3d 496 (2012).

Showing of discrimination essential

A violation of equal protection is not proven by showing that prosecutorial discretions exist because of lack of standards in determining individual prosecutions but, rather, there must be showing of factual and purposeful discrimination against the particular individual or against the suspect classification in which the individual falls, with no proper justifying the governmental purpose in such classification.
Tex.—Eubanks v. State, 635 S.W.2d 568 (Tex. App. Houston 1st Dist. 1982).

4 U.S.—Sumner v. Shuman, 483 U.S. 66, 107 S. Ct. 2716, 97 L. Ed. 2d 56 (1987).

5 Ill.—People v. Caballero, 206 Ill. 2d 65, 276 Ill. Dec. 356, 794 N.E.2d 251 (2002).

6 Ill.—People v. Caballero, 206 Ill. 2d 65, 276 Ill. Dec. 356, 794 N.E.2d 251 (2002).

Equal protection denied

(1) The fact that statistically significant disparities existed in the rates of death sentencing, that depended on the race of the victim and on the race of the defendant, did not subject the defendant to cruel and unusual punishment or deny the defendant equal protection.

N.J.—State v. Martini, 139 N.J. 3, 651 A.2d 949 (1994).

(2) Two versions of a capital-murder procedure statute existing at the time of a defendant's trial, one applicable to offenses committed prior to the date the amendments went into effect and one applicable after the amendments went into effect, did not violate equal protection as those committing the same offense on the same day were subject to the same statutory scheme, were similarly situated, and were similarly treated.

Tex.—Matchett v. State, 941 S.W.2d 922 (Tex. Crim. App. 1996).

No violation of equal protection shown

Imposition of the death penalty on an African American defendant convicted of capital murder of a Caucasian police officer in the line of duty did not violate equal protection under the New Hampshire and United States Constitutions, where there was no evidence that the jury acted with discriminatory purpose, and especially given that jurors were subjected to extensive voir dire during jury selection about racial biases, that defendant did not raise any objection to the seated jury on the basis of racial bias, and that the trial court instructed the jury at the conclusion of the sentence selection phase of trial that race was not a permissible consideration in determining whether death was an appropriate sentence.

N.H.—State v. Addison, 165 N.H. 381, 87 A.3d 1 (2013).

7 Ill.—People v. Hudson, 95 Ill. App. 3d 350, 50 Ill. Dec. 954, 420 N.E.2d 271 (3d Dist. 1981).

Wash.—State v. Duhaime, 29 Wash. App. 842, 631 P.2d 964 (Div. 1 1981).

Particularly brutal and heinous crimes

A sentence of natural life imprisonment imposed on a class of murderers who demonstrate by their conduct their capacity for particularly brutal and heinous crimes indicative of wanton cruelty is reasonably designed to remedy the evil and constitutes a legitimate means that the legislature might seek to protect society; therefore, the legislative determination to differentiate in sentencing between certain classes of murderers is not irrational and does not violate equal protection.

Ill.—People v. La Pointe, 88 Ill. 2d 482, 59 Ill. Dec. 59, 431 N.E.2d 344 (1981).

Habitual offenders

State habitual offender sentencing statutes did not violate equal protection by subjecting recidivist murderers, rapists, and kidnappers to life imprisonment without the benefit of parole.

Miss.—Sutherland v. State, 537 So. 2d 1360 (Miss. 1989).

Juvenile offenders

(1) While a sentencer's ability to impose a sentence of life imprisonment without possibility of parole on a juvenile convicted of homicide is not foreclosed, the sentencer must take into account how children are different and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

U.S.—Miller v. Alabama, 132 S. Ct. 2455, 183 L. Ed. 2d 407, 78 A.L.R. Fed. 2d 547 (2012).

(2) The imposition of a mandatory sentence of life imprisonment without the possibility of parole for juvenile defendant's murder conviction was unconstitutional, and thus, remand for resentencing was required; on remand, the trial court was required to consider mitigating circumstances, such as age and age-related characteristics; the circumstances of the offense, including the extent of the juvenile's participation in the conduct and the way familial and peer pressures may have affected the juvenile; and the defendant's chronological age and the hallmark features of a juvenile of that age.

Fla.—Hernandez v. State, 117 So. 3d 778 (Fla. 3d DCA 2013), review denied, 132 So. 3d 221 (Fla. 2013).

As to the applicability of equal protection principles to habitual offender statutes, see § 1355.

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

7. Sentence and Punishment

§ 1355. Habitual offender and similar statutes

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3106, 3132, 3227, 3243, 3377, 3788, 3792, 3808 to 3811, 3813, 3818

The legislature may, without violating the constitutional guarantee of equal protection, provide a special punishment for habitual offenders as by increasing the punishment of a defendant who has previously been convicted of a felony or other crime.

The legislature may, without violating the constitutional guarantee of equal protection, provide a special punishment for habitual offenders.[1] The test to be used in determining the constitutionality of a statute providing for enhanced punishment for an habitual offender is whether there exists a rational relationship between the classification made and the legitimate governmental interest sought to be accomplished.[2]

An habitual offender statute may enhance the punishment of a defendant who has previously been convicted of a felony or other crime.[3] For example, an habitual criminal statute providing for enhancement of sentences after two prior convictions does not violate federal or state constitutional protections of fundamental fairness, equal protection, or due process of law.[4] In addition, a statute which merely requires a plea of guilty, not a prior conviction, to establish prior-offender status does not deny a defendant equal protection.[5]

On the other hand, giving the state unlimited discretion as to whom to proceed against under an habitual offenders statute constitutes a violation of equal protection.[6] However, an exercise of prosecutorial discretion without a showing of a pattern of discrimination by reason of willful, arbitrary, designed, deliberate, intentional, or concerted action does not deprive a defendant of equal protection.[7]

The failure to apply a recidivist statute because of a lack of knowledge of prior convictions or the unavailability of the requisite documentation at sentencing does not violate equal protection.[8]

Footnotes

1 Colo.—People v. Gutierrez, 622 P.2d 547 (Colo. 1981).
Ind.—Ferguson v. State, 438 N.E.2d 286 (Ind. 1982).
Tenn.—State v. Yarbro, 618 S.W.2d 521 (Tenn. Crim. App. 1981).
Valid governmental purpose
There is a valid governmental purpose in dealing with habitual offenders more harshly than first-time offenders.
N.Y.—People v. Pacheco, 73 A.D.2d 370, 426 N.Y.S.2d 57 (2d Dep't 1980), order aff'd, 53 N.Y.2d 663, 438 N.Y.S.2d 994, 421 N.E.2d 114 (1981).
Habitual traffic offender statute
A statute defining a habitual offender as any person accumulating a specified number of convictions for separate and distinct traffic offenses within certain time periods, but allowing multiple offenses committed within a one-day period to be treated as one offense, involves neither a suspect class nor a fundamental right, and thus, it could be found to violate the Equal Protection Clause only if it was without rational basis.
Colo.—Fuhrer v. Department of Motor Vehicles, 197 Colo. 325, 592 P.2d 402 (1979).
As to strict scrutiny of classifications involving fundamental rights, generally, see § 1277.
As to strict scrutiny of suspect classifications based upon race, ethnicity, or creed, see § 1282.

2 Iowa—State v. Kramer, 235 N.W.2d 114 (Iowa 1975).
N.Y.—People v. Pacheco, 73 A.D.2d 370, 426 N.Y.S.2d 57 (2d Dep't 1980), order aff'd, 53 N.Y.2d 663, 438 N.Y.S.2d 994, 421 N.E.2d 114 (1981).
As to the rational basis test, generally, see § 1279.

3 U.S.—Haag v. Ward, 632 F.2d 206 (2d Cir. 1980); Frazier v. Harrison, 537 F. Supp. 13 (E.D. Tenn. 1981), aff'd, 698 F.2d 1219 (6th Cir. 1982).
N.Y.—People v. Nichols, 82 A.D.2d 632, 442 N.Y.S.2d 825 (3d Dep't 1981).
Constitutional strictures not violated
The legislature may constitutionally enhance the punishment for habitual offenders without violating constitutional strictures dealing with double jeopardy, ex post facto laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities.
N.C.—State v. Todd, 313 N.C. 110, 326 S.E.2d 249 (1985).
No violation of equal protection shown
Sentencing a defendant, who was convicted of possession of heroin and who had two prior felony offenses not covered by a statute concerning controlled dangerous substances, under a general habitual criminal statute, rather than as a first-time offender under a statute prohibiting possession of controlled substances, did not violate the defendant's equal protection rights; the legislature clearly viewed a drug offender with prior nondrug-related offenses to be more culpable than a drug offender with prior drug possession offenses.
Okla.—Mitchell v. State, 1987 OK CR 13, 733 P.2d 412 (Okla. Crim. App. 1987).
Classification of offenses used as basis for enhanced penalty
Classification of manslaughter as a violent felony and the exclusion of aggravated vehicular homicide from that classification, under a sentencing scheme whereby a violent felony conviction could be used as a basis

for an habitual criminal enhanced penalty, did not deny equal protection of the laws to a defendant sentenced as an habitual offender after conviction for manslaughter for the beating death of the defendant's wife.

Wyo.—Bell v. State, 693 P.2d 769 (Wyo. 1985).

Determination of predicate felony

A statute which states that, for the purpose of determining whether a prior conviction is a predicate felony, a sentence must have been imposed not more than 10 years before commission of the present felony, but which also states that the 10-year period is to be extended by time served under incarceration, did not violate equal protection as applied to a defendant, who allegedly had lived his entire life in prison, since it is clearly not irrational to distinguish between a law-abiding citizen living outside the confines of a penal institution and a prisoner living within such an institution.

N.Y.—People v. Abbott, 113 Misc. 2d 766, 449 N.Y.S.2d 853 (Sup 1982), aff'd, 178 A.D.2d 281, 577 N.Y.S.2d 370 (1st Dep't 1991).

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Chronological or procedural sequence of former convictions as affecting enhancement of penalty under habitual offender statutes, 7 A.L.R.5th 263.

4 Neb.—Kerns v. Grammer, 227 Neb. 165, 416 N.W.2d 253 (1987).

No violation of due process or equal protection by double punishment

A habitual offender statute is not unconstitutional on the ground it denies a defendant due process and equal protection of law by punishing a defendant twice for acts for which the defendant was already punished.

N.C.—State v. Todd, 313 N.C. 110, 326 S.E.2d 249 (1985).

"Three strikes law"

Because persons convicted of three "most serious offenses" do not constitute a suspect or semisuspect class, and because physical liberty is an important, but not a fundamental, right, the proper standard of review for an equal protection challenge to the "three strikes law" was rational basis review.

Wash.—State v. Manussier, 129 Wash. 2d 652, 921 P.2d 473 (1996).

5 Mo.—State v. Eib, 716 S.W.2d 304 (Mo. Ct. App. W.D. 1986).

6 Or.—City of Klamath Falls v. Winters, 289 Or. 757, 619 P.2d 217 (1980).

Relevant criteria

A decision by a prosecutor to seek habitual criminal status against a defendant was not a denial of equal protection, where the prosecutor decided to proceed with the charge after considering the relevant criteria of the defendant's record of six prior felonies, the defendant's previous incarceration in state prison, the defendant's subsequent chances for rehabilitation, and the repeated pattern of criminal activity, and where there was no evidence that the prosecutor exercised discretion in an arbitrary or capricious manner, or that the decision to file the charge was based on the defendant's race, sex, creed, or religion.

Wash.—State v. Ross, 30 Wash. App. 324, 634 P.2d 887 (Div. 2 1981).

No discretion where showing of convictions mandated

A district attorney who has knowledge of a defendant's prior convictions must, as an officer of the court, "show" those convictions to the court so that the trial court can sentence the accused in accordance with the clear mandate of a recidivist statute; therefore, the prosecution has no discretion about whether or not to "show" prior convictions, refuting the contention that a habitual felony offenders act is violative of equal protection on the basis that sole discretion as to whether the statute is invoked lies with the district attorney's office.

Ala.—Waites v. State, 409 So. 2d 1005 (Ala. Crim. App. 1982).

7 Kan.—State v. Foy, 224 Kan. 558, 582 P.2d 281 (1978).

La.—State v. Badon, 338 So. 2d 665 (La. 1976).

Mich.—People v. McGilmer, 96 Mich. App. 433, 292 N.W.2d 700 (1980).

General arbitrary application or classification

A defendant failed to show that wide discretion granted to the prosecutor by a habitual criminal statute was being, or had been, applied in a manner which denied the defendant equal protection of the law, absent a showing that the statute was generally applied in an arbitrary fashion or through some arbitrary classification, that the statute was arbitrarily applied against the defendant, or that the defendant was unjustly found to be a habitual offender.

Ind.—Smith v. State, 422 N.E.2d 1179 (Ind. 1981).

8 U.S.—Jones v. White, 992 F.2d 1548 (11th Cir. 1993).

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Constitutional Law
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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

7. Sentence and Punishment

§ 1356. Probation; suspension of sentence; credit for time served

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3133(2), 3227, 3243, 3341(2), 3445, 3819 to 3825

A statute which provides for the probation or parole of offenders in certain cases, but not in others, does not violate equal protection.

A statute which provides for the probation of offenders in certain cases,[1] but not in others, does not violate equal protection.[2] Furthermore, the conditions of probation need not be the same for every defendant, and the fact that they are not is not a denial of equal protection.[3] Thus, conditioning a defendant's probation on the payment of costs based on actual ability to pay,[4] or requiring a defendant to pay a fine and make restitution, does not give rise to a deprivation of equal protection.[5]

Probation revocation.

Where statutes dealing with probation revocation are not applied differently to a defendant than to any other alleged probation violator, the defendant is not denied equal protection.[6] When a probationer asserts that a state's revocation of probation procedure violates equal protection in that it permits a jury trial in some probation revocation hearings but not in others, no violation of

equal protection will be found absent a showing that the State has drawn impermissible lines or made classifications violative of the Fourteenth Amendment of the United States Constitution.[7]

It is not a denial of equal protection for the state to charge a defendant with probation violation, yet charge other probationers with the substantive offense which is the basis of the charged violation.[8]

Suspension of sentence.

A statute which precludes the suspension of sentence in certain types of cases or situations does not violate equal protection.[9] However, the constitutional guarantee of equal protection is violated by a sentencing court's offer to an indigent defendant of the opportunity to "buy" a suspension of a portion of a prison sentence by paying restitution.[10]

Because a suspended sentence is granted as favor, and not as matter of right, the legislature may circumscribe the court's power to suspend to a greater or lesser degree provided that the sentencing process as a whole complies with the requirements of due process and other constitutional restraints.[11]

Credit for time served.

Equal protection does not require that credit be given for preconviction custody time when imposing a sentence of probation notwithstanding a statute requiring credit for time spent in custody when imposing a sentence of imprisonment.[12] Moreover, the failure to credit a defendant's presentence incarceration against the maximum prison sentence, imposed following the revocation of probation, does not constitute a denial of equal protection where the presentence incarceration has been credited against the jail sentence imposed on the defendant as a condition of probation.[13]

Where a defendant is held without bail before trial because the defendant is charged with a nonbailable offense in an information, which presents sufficient justification for holding the defendant without bail, the failure to give the defendant credit on a sentence for time spent in jail before trial does not constitute an invidious discrimination because of indigency.[14] On the other hand, failure to credit a defendant with the entire period of presentence custody,occasioned by reason of the defendant's financial inability to post bail, conflicts with the constitutional right to equal protection.[15] The double jeopardy and equal protection clauses of the West Virginia Constitution require that time spent in jail before conviction must be credited against all terms of incarceration to a correctional facility imposed in a criminal case as a punishment upon conviction when the underlying offense is bailable.[16] Moreover, equal protection principles require recognition of time served when a defendant is resentenced to rectify the record as to acts which should have occurred.[17]

CUMULATIVE SUPPLEMENT

Cases:

Excluding misdemeanants from application of statute allowing the possibility of serving a probation sentence concurrently with the sentence on a subsequent offense does not violate Equal Protection; benefit extended did not implicate a fundamental right, potential to serve a sentence on the probation offense concurrently with a short-term misdemeanor sentence could rationally be viewed as too small a benefit to trigger the speedy-sentencing procedures, and benefit of concurrent sentencing was minuscule, while the increased burdens on the judicial and penal systems would be substantial. U.S. Const. Amend. 14; Cal. Penal Code § 1203.2a. People v. Mendoza, 241 Cal. App. 4th 764, 194 Cal. Rptr. 3d 273 (4th Dist. 2015).

Defendant was not constitutionally entitled, under Double Jeopardy and Equal Protection Clauses of the West Virginia Constitution, to credit against sentence on negotiated guilty plea to felony carrying concealed firearm by prohibited person for time served on other unrelated charges that were dismissed as part of universal plea agreement. W. Va. Const. art. 3, §§ 1, 5; W. Va. Code Ann. § 61-11-24. State v. Taylor, 842 S.E.2d 224 (W. Va. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Ga.—Williams v. State, 162 Ga. 327, 133 S.E. 843 (1926).

Two kinds of probation

The fact that a statute governing the completion of sentencing in a prior matter, where a defendant has entered on a term of imprisonment in connection with a subsequent criminal matter, is applicable to probation granted after suspending pronouncement of judgment but is inapplicable to probation granted after suspending a state prison sentence does not violate equal protection as an invidious discrimination since there are valid reasons for the two different methods of granting probation.

Cal.—Boles v. Superior Court, 37 Cal. App. 3d 479, 112 Cal. Rptr. 286 (3d Dist. 1974).

As to equal protection with respect to parole, generally, see § 1364.

2 Cal.—People v. Gayther, 110 Cal. App. 3d 79, 167 Cal. Rptr. 700 (3d Dist. 1980).

Kan.—State v. McDaniel, 228 Kan. 172, 612 P.2d 1231 (1980).

Classification not suspect; "strict scrutiny" unnecessary

Iowa—State v. Fagen, 323 N.W.2d 242 (Iowa 1982).

Tenn.—State v. Correll, 626 S.W.2d 699 (Tenn. 1982).

Sentencing to incarceration rather than probation

Sentencing of defendant convicted of driving while intoxicated (DWI) to incarceration, rather than probation, due to defendant's inability to speak English, was rationally related to legitimate government interest in sentencing individual convicted of second DWI offense, and thus did not deny defendant due process, equal protection, due course of law, or equal rights, since probation was not viable option without alcohol rehabilitation program, which was conducted only in English.

Tex.—Flores v. State, 904 S.W.2d 129 (Tex. Crim. App. 1995).

Probationers not suspect classification

Sex offenders on probation or, for that matter, probationers in general are not a suspect or quasi-suspect classification for equal protection purposes.

R.I.—Pelland v. Rhode Island, 317 F. Supp. 2d 86 (D.R.I. 2004).

As to strict scrutiny of classifications involving fundamental rights, generally, see § 1277.

As to strict scrutiny of suspect classifications based upon race, ethnicity, or creed, see § 1282.

3 S.D.—White Eagle v. State, 280 N.W.2d 659 (S.D. 1979).

Curtailment of interstate travel

A policy that curtailed the right of sex-offender probationers to travel interstate did not violate equal protection, since the goals of the policy were to promote community safety and compliance with the laws in other states governing the interstate travel of sex offenders, and the restraints imposed by the policy, which served to improve the ability of the department of corrections to oversee the movements of sex-offender probationers, were reasonably related to the government's legitimate interest in protecting the public.

U.S.—Pelland v. Rhode Island, 317 F. Supp. 2d 86 (D.R.I. 2004).

Extended supervision of sex offenders

Extended supervision statute, requiring, in addition to any other penalty or condition imposed by the court, a period of supervised release of up to 50 years for defendants convicted of certain sex offenses did not violate equal protection provisions of federal or state constitutions since sex offenders were not similarly situated to offenders who had not been convicted of sex offenses.

W. Va.—State v. Hargus, 232 W. Va. 735, 753 S.E.2d 893 (2013), petition for certiorari filed, 135 S. Ct. 63, 190 L. Ed. 2d 60 (2014).

4 Mich.—People v. Williams, 66 Mich. App. 67, 238 N.W.2d 407 (1975).
Wash.—State v. Barklind, 87 Wash. 2d 814, 557 P.2d 314 (1976).
5 Utah—State v. Dowell, 30 Utah 2d 323, 517 P.2d 1016 (1974).
6 N.D.—John v. State, 160 N.W.2d 37 (N.D. 1968).
7 U.S.—Morgan v. Wainwright, 676 F.2d 476 (11th Cir. 1982).
8 Ill.—People v. Ruiz, 78 Ill. App. 3d 326, 33 Ill. Dec. 590, 396 N.E.2d 1314 (1st Dist. 1979).
Improper selectivity or impermissible standard
Where a defendant made no showing either of improper selectivity in the prosecution on probation revocation prior to prosecution for the subsequent crime with which the defendant was charged or the use of an impermissible standard by the state in making its decision to prosecute the defendant first on the petition to revoke probation, the defendant did not demonstrate any violation of equal protection.
Ill.—People v. Golz, 53 Ill. App. 3d 654, 11 Ill. Dec. 461, 368 N.E.2d 1069 (2d Dist. 1977).
9 Ind.—Downs v. State, 267 Ind. 342, 369 N.E.2d 1079 (1977).
Tenn.—State v. Correll, 626 S.W.2d 699 (Tenn. 1982).
Limitations on exercise of power
The legislature, in providing for a suspended sentence, was not acting arbitrarily or discriminatorily in placing limits upon the exercise of that power by the trial courts or by prohibiting the courts from suspending sentence once a defendant had begun to serve the sentence.
Tenn.—Becton v. State, 506 S.W.2d 137 (Tenn. 1974).
Equal protection not violated
(1) Different treatment accorded repeat drug offenders and repeat nondrug offenders, as to eligibility for a suspended sentence, was not violative of equal protection.
Okla.—May v. State, 1990 OK CR 14, 788 P.2d 408 (Okla. Crim. App. 1990).
(2) Defendants whose sentences were suspended while they were committed to a state hospital for treatment as sex offenders were not denied federal or state constitutional equal protection rights through the denial of a good-time credit for time served at the hospital when incarceration was subsequently imposed.
Wash.—Petition of Borders, 114 Wash. 2d 171, 786 P.2d 789 (1990).
As to equal protection considerations with respect to good-time credits, generally, see § 1363.
10 § 1357.
11 N.H.—State v. Callaghan, 125 N.H. 449, 480 A.2d 209 (1984).
12 Ill.—People v. Miles, 53 Ill. App. 3d 137, 10 Ill. Dec. 701, 368 N.E.2d 187 (3d Dist. 1977).
Credit only for incarceration
(1) A court's denial of credit for time a probationer served in electronically monitored home detention, upon revocation of probation, did not deny the probationer equal protection of the law.
Ind.—Barton v. State, 598 N.E.2d 623 (Ind. Ct. App. 1992).
(2) Under the double jeopardy and equal protection clauses of the state constitution, time spent in jail, either pretrial or posttrial, must be credited on the sentence; however, the principle is inapplicable where an individual has not been subject to incarceration or the equivalent thereof.
W. Va.—State v. Hughes, 197 W. Va. 518, 476 S.E.2d 189 (1996).
(3) It is not a denial of equal protection for a trial court, when imposing sentence after a probation revocation to refuse to credit the defendant with time served at a drug rehabilitation center, pursuant to a condition of probation, notwithstanding that credit is allowed for time served in a county jail.
N.Y.—Guiseppone v. Ward, 70 A.D.2d 731, 416 N.Y.S.2d 869 (3d Dep't 1979).
13 Ariz.—State v. Fuentes, 26 Ariz. App. 444, 549 P.2d 224 (Div. 1 1976), opinion adopted, 113 Ariz. 285, 551 P.2d 554 (1976).
14 Ark.—Travis v. State, 256 Ark. 640, 509 S.W.2d 550 (1974).
As to equal protection considerations with respect to sentencing and punishment of indigents, see § 1357.
15 N.Y.—LaViscount v. Coughlin, 103 Misc. 2d 383, 425 N.Y.S.2d 960 (Sup 1980).
Ohio—State v. Fugate, 117 Ohio St. 3d 261, 2008-Ohio-856, 883 N.E.2d 440 (2008).
As to equal protection considerations with respect to bail, generally, see § 1323.
16 W. Va.—State v. Eilola, 226 W. Va. 698, 704 S.E.2d 698 (2010).
17 Wash.—State v. Smissaert, 103 Wash. 2d 636, 694 P.2d 654 (1985).

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Constitutional Law
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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

7. Sentence and Punishment

§ 1357. Indigency as factor in sentencing and punishment

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3106, 3132, 3133(2), 3227, 3243, 3341(2), 3377, 3445, 3788, 3792, 3808 to 3811, 3813, 3818, 3819 to 3825

Generally, to imprison an indigent defendant when in the same circumstances an individual of financial means would remain free constitutes a denial of equal protection.

To imprison an indigent defendant when in the same circumstances an individual of financial means would remain free generally constitutes a denial of equal protection.[1] Thus, a sentencing court is precluded, on equal protection grounds, from imposing imprisonment on a defendant solely because of the defendant's poverty.[2] However, if a wrongdoer were insulated from punishment simply because of indigency, equal protection would be denied the offender who is punished,[3] and the mere fact that an indigent in a particular case may be imprisoned for a longer time than a nonindigent convicted of the same offense does not give rise to a violation of equal protection.[4]

Equal protection requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status.[5] When an indigent defendant has been incarcerated for a period, including

presentence time, which exceeds the maximum penalty for an offense, the defendant has been punished more severely than one who could afford to obtain presentence relief in violation of equal protection.[6]

A statute, as applied to an indigent, works an invidious discrimination when the indigent is forced to remain in prison solely because the person is too poor to pay a fine or court costs.[7] For example, a standard practice of imposing a fine plus a restitution charge in order to nolle prosse a false pretense prosecution under a bad check law violates an indigent defendant's equal protection rights where the amount is due immediately and there is no determination of ability to pay, and thus, a defendant who is unable to pay is placed in a position of facing a felony conviction and jail time while those with adequate resources are not.[8] In such a case, it is the automatic nature of the fine that makes it discriminatory with respect to indigents.[9] However, a statute imposing a mandatory surcharge as part of an indigent's sentence neither violates equal protection nor renders the sentence excessive.[10]

The constitutional guarantee of equal protection is violated by a sentencing court's offer to an indigent defendant of the opportunity to "buy" a suspension of a portion of a prison sentence by paying restitution.[11] On the other hand, a rule making it a denial of equal protection to convert a fine into a jail term solely because the defendant is indigent is not violated in a situation where a defendant, with assistance of counsel, has tendered a schedule of payment for restitution in exchange for a suspended sentence and then makes sporadic payments in violation of the payment schedule.[12]

A defendant's right to equal protection is not violated when the defendant is placed on a lengthy period of supervision because of the defendant's inability to immediately pay an obligation imposed as part of the disposition provided that, if given time, the defendant would be able to make substantial payments toward the obligation.[13]

Probation; revocation.

The conditioning of probation on a defendant's repayment of court-appointed counsel fees does not violate equal protection.[14] However, the revocation of probation based on indigency is a denial of equal protection.[15] It is impermissibly discriminatory to revoke a defendant's probation and send a defendant to prison for failure to pay a fine or make restitution which a wealthier individual could pay without first determining that the defendant has not made sufficient bona fide efforts to pay the outstanding fine and that alternatives to prison, such as public service or an extended payment schedule, are not adequate to meet the state's interest in punishment and deterrence.[16]

Footnotes

1 U.S.—Pugh v. Rainwater, 572 F.2d 1053 (5th Cir. 1978).
Haw.—State v. Tackett, 52 Haw. 601, 483 P.2d 191 (1971).
Detention occasioned by indigency
The deprivation of liberty by detention in a county jail, whether as a preconviction detainee or postconviction prisoner awaiting sentence or delivery to prison, constitutes "punishment," and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution is violated where the detention is occasioned by the prisoner's indigency.
U.S.—Taylor v. Gray, 375 F. Supp. 790 (E.D. Wis. 1974).

2 Wis.—State v. Longmire, 2004 WI App 90, 272 Wis. 2d 759, 681 N.W.2d 534 (Ct. App. 2004).

3 Iowa—State v. Snyder, 203 N.W.2d 280 (Iowa 1972).

4 U.S.—Williams v. Illinois, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).
Bail requirement

A bail requirement, otherwise not excessive, does not deprive an indigent defendant of equal protection in a probation revocation proceeding.

Me.—State v. Chamberland, 499 A.2d 143 (Me. 1985).

As to equal protection considerations with respect to bail, generally, see § 1323.

5 U.S.—Williams v. Illinois, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).

Conn.—Moscone v. Manson, 185 Conn. 124, 440 A.2d 848 (1981).

6 Wyo.—Jones v. State, 771 P.2d 368 (Wyo. 1989).

As to equal protections considerations with respect to credit for time served in prison, see § 1356.

7 U.S.—Tate v. Short, 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971).

Conn.—Allen v. Warden, Community Correctional Center, 31 Conn. Supp. 459, 334 A.2d 488 (Super. Ct. 1975).

Further applications of rule

The rule which was promulgated by the United States Supreme Court in Tate, and which prohibits the state from imposing a fine and sentence and then automatically converting it into a jail term solely because a defendant is indigent and cannot forthwith pay the fine in full, applies where restitution rather than a fine is involved and also applies after the time of sentencing as long as an imprisonment results from the defendant's indigence.

Nev.—Burke v. State, 96 Nev. 449, 611 P.2d 203 (1980).

Consecutive sentences

Insofar as a statute provided consecutive sentences in lieu of a fine and costs where the defendant also is given jail sentence, it was vulnerable to attack on equal protection grounds.

Del.—State v. Bender, 283 A.2d 847 (Del. Super. Ct. 1971).

8 Miss.—Moody v. State, 716 So. 2d 562 (Miss. 1998).

9 Miss.—Moody v. State, 716 So. 2d 562 (Miss. 1998).

Sentence in the alternative

A statute which prescribes the punishment for a misdemeanor as imprisonment, a fine, or both, is not per se constitutionally infirm although a sentence in the alternative may penalize an indigent by causing imprisonment and creating an invidious discrimination based on wealth.

Ariz.—Application of Collins, 108 Ariz. 310, 497 P.2d 523 (1972).

Opportunity to make installment payments

A prisoner's incarceration to satisfy the payment of fines and costs levied upon the prisoner, without giving the indigent prisoner the option of paying the same by installments, denied the prisoner equal protection of the law.

Mo.—Hendrix v. Lark, 482 S.W.2d 427 (Mo. 1972).

Option essential

Imposition upon an indigent offender of a fine and penalty assessment does not necessarily constitute a violation of the constitutional guarantee of equal protection, but an indigent who would pay a fine if the indigent could must be given an option comparable to an offender who is not indigent.

Cal.—In re Antazo, 3 Cal. 3d 100, 89 Cal. Rptr. 255, 473 P.2d 999 (1970).

10 N.Y.—People v. James, 144 A.D.2d 717, 535 N.Y.S.2d 452 (3d Dep't 1988).

11 Md.—Reddick v. State, 327 Md. 270, 608 A.2d 1246 (1992).

As to equal protection considerations with respect to suspended sentences, see § 1356.

12 Ark.—Hoffman v. State, 289 Ark. 184, 711 S.W.2d 151 (1986).

13 Wis.—State v. Longmire, 2004 WI App 90, 272 Wis. 2d 759, 681 N.W.2d 534 (Ct. App. 2004).

14 S.D.—White Eagle v. State, 280 N.W.2d 659 (S.D. 1979).

Consideration of financial ability to pay; hardship

(1) A state recoupment scheme under which probation may be revoked for failure of a defendant to reimburse the state for costs of providing representation by counsel when the defendant is indigent does not constitute an impermissible discrimination based on wealth in view of a limitation of the obligation to repay to those who are found able to do so.

U.S.—Fuller v. Oregon, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).

(2) The requirement, as a condition of probation, that an indigent defendant reimburse the county for a portion of the expense of a court-appointed attorney, if possible, did not violate equal protection on the ground that indigent defendants are not afforded relief of the ordinary exemption statutes which are available

to judgment debtors since the defendant was not a judgment debtor in the ordinary sense and had been ordered to pay the fee as part of the defendant's probation only if the defendant had the present financial ability to do so without causing undue hardship to the defendant or any dependents of the defendant.

Wash.—State v. Barklind, 12 Wash. App. 818, 532 P.2d 633 (Div. 1 1975), judgment aff'd, 87 Wash. 2d 814, 557 P.2d 314 (1976).

Ordering restitution as condition of probation

While equal protection requires a court to grant a hearing on a defendant's ability to pay restitution, as a condition of probation, it does not require the judge to make a finding of ability to pay before ordering restitution.

Cal.—People v. Warnes, 10 Cal. App. 4th Supp. 35, 12 Cal. Rptr. 2d 893 (App. Dep't Super. Ct. 1992).

As to equal protection considerations with respect to probation, generally, see § 1356.

15 Mich.—People v. Courtney, 104 Mich. App. 454, 304 N.W.2d 603 (1981).

16 U.S.—Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983).

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

8. Confinement of Prisoners; Parole

§ 1358. Rights of prisoners

Topic Summary | References | Correlation Table

West's Key Number Digest

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A prison inmate is not stripped of all rights during incarceration, and subject to the legitimate requirements of prison discipline and security, an inmate retains the constitutional right to equal protection.

A prison inmate is not stripped of all rights during incarceration, and subject to the legitimate requirements of prison discipline and security, an inmate retains the constitutional right to equal protection.[1] A prisoner who is denied a privilege enjoyed by fellow inmates can state a cognizable complaint for denial of equal protection.[2] However, variations in practices among institutions do not show a violation of inmates' equal protection rights unless those variations are not rationally related to the legitimate purposes of those institutions.[3] A prison official should have broad discretion in determining how inmates are to be housed, limited only by the Fourteenth Amendment's right to equal protection, among other constitutional protections.[4]

Prisoner claims do not form an exception to the general rule that equal protection claims need not be based on the denial of a fundamental right or the involvement of a suspect class.[5] However, prisoners are not a suspect class for equal protection purposes.[6]

So far as treating prisoners differently than nonprisoners is concerned, the Equal Protection Clause requires only that a classification which results in unequal treatment bears some rational relationship to a legitimate state purpose.[7] If classifications do not relate to a suspect class or impinge on a fundamental right, the court need only seek assurance that they bear some fair relationship to a legitimate public purpose,[8] and prison officials need only demonstrate a rational basis for their distinctions between organizational groups or classifications.[9] Thus, without an allegation by a prisoner that the prisoner, or the class to which the prisoner belongs, has received treatment from a prison board or official which is invidiously dissimilar to that received by other inmates, there is no basis for an equal protection claim.[10]

Prisoner suspected of criminal activity.

The placement of prisoners suspected of criminal activity in administrative confinement pending the ultimate disposition of the charges, coupled with prosecutorial delay, does not violate the equal protection rights of such prisoners to such an extent as to justify dismissal of the pending criminal charges.[11]

Recovering costs of confinement or court costs.

A statute allowing the imposition of incarceration costs does not violate the right of indigent defendants to equal protection, since the recovery of the costs of incarceration is rationally related to the State's goal to hold defendants accountable for the costs attributed to them, where the financial ability to pay is only one factor that a court may consider in determining whether a defendant should be confined prior to trial and where the court has the discretion to waive costs in cases where it finds that the defendant otherwise would suffer manifest hardship.[12] The fact that as a state prisoner an individual receives no credit against court costs owed by the prisoner for labor performed while in prison, whereas county prisoners receive a credit per day for labor performed, does not deprive such inmate of equal protection.[13]

CUMULATIVE SUPPLEMENT

Cases:

Pro se state inmate's allegation that he experienced unequal treatment as result of intentional and purposeful discrimination as an act of reprisal, harassment, and retaliation for his filing of informal grievance, and that prison captain treated him differently than other inmates who had filed similar grievances in retaliation for inmate's exercise of his right to petition for redress of grievances was mere rewording of his First Amendment retaliation claim that did not implicate Equal Protection Clause. U.S. Const. Amends. 1, 14, § 1. Martin v. Duffy, 858 F.3d 239 (4th Cir. 2017).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Sweet v. South Carolina Dept. of Corrections, 529 F.2d 854 (4th Cir. 1975); Hutchings v. Corum, 501 F. Supp. 1276 (W.D. Mo. 1980).

Cal.—Molar v. Gates, 98 Cal. App. 3d 1, 159 Cal. Rptr. 239, 12 A.L.R.4th 1197 (4th Dist. 1979).

2 U.S.—Wright v. Cuyler, 517 F. Supp. 637 (E.D. Pa. 1981).

All individuals

The Fourteenth Amendment of the United States Constitution requires that all individuals, including state prisoners, similarly situated be similarly treated.

U.S.—Hluchan v. Fauver, 480 F. Supp. 103 (D.N.J. 1979).

3 U.S.—Marciano v. Coughlin, 510 F. Supp. 1034 (E.D. N.Y. 1981).

Mere inconsistency

A mere inconsistency in prison management may not in itself constitute a cognizable equal protection claim.

U.S.—Young v. Hunt, 507 F. Supp. 785 (N.D. Ind. 1981).

4 U.S.—Layton v. Wolff, 516 F. Supp. 629 (D. Nev. 1981).

Deference to prison authority

The traditional standard for evaluation of equal protection claims, requiring the existence of a rational basis for differential treatment, is colored by deference to prison authority in the administration of prison matters.

Iowa—State v. Kyle, 271 N.W.2d 689 (Iowa 1978).

As to the rational basis test for violations of equal protection, generally, see § 1279.

5 U.S.—Durso v. Rowe, 579 F.2d 1365 (7th Cir. 1978).

6 U.S.—Nicholas v. Riley, 874 F. Supp. 10 (D.D.C. 1995), aff'd, 1995 WL 686227 (D.C. Cir. 1995).

Prisoners and indigents not members of suspect class

Neither prison inmates nor indigents constitute a suspect class entitled to heightened scrutiny under the Equal Protection Clause

Miss.—Tubwell v. Anderson, 776 So. 2d 654 (Miss. 2000).

Classification based on national origin

Discrimination on the basis of national origin involves a suspect classification requiring strict scrutiny in an equal protection analysis, but there was no suspect class requiring strict scrutiny where disparate treatment concerning the language of instruction in classes at a prison depended on the language spoken by the prisoner.

U.S.—Pabon v. McIntosh, 546 F. Supp. 1328, 35 Fed. R. Serv. 2d 294 (E.D. Pa. 1982).

Special concerns of prison administration

Because of special concerns of prison administration, a standard of equal protection review that is lower than strict scrutiny is applied to prison regulations that implicate fundamental rights of prisoners, such as freedom of speech, marriage, and religion; in these cases, the courts look to see whether the state action is reasonably related to a legitimate penological interest.

Mont.—McDermott v. Montana Dept. of Corrections, 2001 MT 134, 305 Mont. 462, 29 P.3d 992 (2001).

As to strict scrutiny of classifications involving fundamental rights, generally, see § 1277.

7 U.S.—Nicholas v. Riley, 874 F. Supp. 10 (D.D.C. 1995), aff'd, 1995 WL 686227 (D.C. Cir. 1995).

Regulation governing early release

The rational basis test, rather than strict scrutiny, applied to an inmate's equal protection challenge to a Bureau of Prisons regulation making inmates who complete substance-abuse treatment programs, but who have a prior violent felony conviction, ineligible for early release since the regulation did not implicate a suspect class or fundamental right.

U.S.—Wottlin v. Fleming, 136 F.3d 1032 (5th Cir. 1998).

As to strict scrutiny of suspect classifications based upon race, ethnicity, or creed, see § 1282.

As to equal protection considerations with respect to early release, see § 1362.

8 U.S.—Mueller v. Turcott, 501 F.2d 1016 (7th Cir. 1974).

Iowa—Ames Rental Property Ass'n v. City of Ames, 736 N.W.2d 255 (Iowa 2007).

S.C.—McLamore v. State, 257 S.C. 413, 186 S.E.2d 250 (1972).

Physical presence at proceeding

A felon incarcerated in a foreign jurisdiction is not denied equal protection where the State has statutorily provided a means by which inmates confined within its own penal system may insure their physical presence at any judicial proceeding designed to sever their parental rights, without establishing a similar mechanism for those confined by other states.

Cal.—In re Gary U., 136 Cal. App. 3d 494, 186 Cal. Rptr. 316 (4th Dist. 1982).

9 U.S.—Pabon v. McIntosh, 546 F. Supp. 1328, 35 Fed. R. Serv. 2d 294 (E.D. Pa. 1982); Hill v. Hutto, 537 F. Supp. 1185 (E.D. Va. 1982).

Differentiation based on crime committed

As respects an equal protection challenge, it is perfectly rational to differentiate between prisoners on the basis of the nature of the crime they have committed.

U.S.—Hluchan v. Fauver, 480 F. Supp. 103 (D.N.J. 1979).

Exercise of discretion

A prison regulation must define the exercise of discretion to treat different classes of prisoners differently, or there is no rational basis for such a distinction sufficient to comply with the constitutional guarantee of equal protection.

U.S.—Hluchan v. Fauver, 480 F. Supp. 103 (D.N.J. 1979).

10 U.S.—Peck v. Hoff, 660 F.2d 371 (8th Cir. 1981).

N.Y.—People v. Bennet, 39 A.D.2d 320, 334 N.Y.S.2d 350 (2d Dep't 1972).

11 Fla.—State v. Luke, 382 So. 2d 1265 (Fla. 1st DCA 1980).

12 Okla.—Hubbard v. State, 2002 OK CR 8, 45 P.3d 96 (Okla. Crim. App. 2002).

As to the rational basis test for violations of equal protection, generally, see § 1279.

As to equal protection considerations with respect to sentencing and punishment of indigents, generally, see § 1357.

13 N.D.—State v. Allred, 254 N.W.2d 701 (N.D. 1977).

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16B C.J.S. Constitutional Law § 1359

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Constitutional Law
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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

8. Confinement of Prisoners; Parole

§ 1359. Place and conditions of confinement

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3133(2), 3227, 3243, 3341(2), 3445, 3819 to 3825

Statutory authority given to specified persons to designate the institution where a convict is to serve a term of imprisonment is limited by the convict's right to equal protection of the law, so as not to have the sentence increased or made more onerous by the detention.

Statutory authority in the attorney general, judge, or jury to designate the institution where a convict is to serve a term of imprisonment is limited by the convict's right to equal protection of the law, so as not to have the sentence increased or made more onerous by the detention.[1] Subject to such a limitation, a statute is not invalid which confers on the court, jury, or a particular officer or board discretionary power relative to designating the place of confinement,[2] or which provides that first offenders are to be committed to a reformatory while others are committed to the state prison,[3] or which provides for the commitment of a defendant convicted under an insanity plea to a state hospital.[4]

Where a state statute explicitly guarantees the right to psychiatric treatment to all persons committed to the state hospital, but the psychiatric treatment provided to dangerous patients housed in the penitentiary is substantially inferior to that provided in the state hospital, in both quantity and quality, the patients confined in the penitentiary are denied equal protection.[5] Furthermore,

equal protection considerations mandate that a prisoner cannot be held to a higher standard of mental recovery than a civil committee.[6]

Equal protection is not violated where the rules and regulations by the prison authorities with respect to prison conditions further a legitimate state interest and are rationally related to legitimate purposes.[7] Maintaining separate facilities for male and female inmates does not constitute a denial of equal protection,[8] nor does a restriction on the sexual activities of inmates of penal institutions.[9] A statutory classification under which a prisoner may exercise the right to marry if the prisoner is a "lifer," but not otherwise, does not violate equal protection.[10] On the other hand, a prohibition against inmates marrying before parole while serving a life sentence is not reasonably related to legitimate penological objectives and thus violates equal protection.[11]

Where organizations which are permitted to make bulk mailings to prison inmates and are afforded meeting rights serve a rehabilitative purpose, work in harmony with the goals and desires of the prison administration, and have been determined not to pose any threat to the order or security of the institution, while the chartered purpose of a prisoners' union is illegal under state law, a reasonable belief that there are fundamental differences between such union and the other organizations is sufficient to justify a denial of bulk mailing and meeting rights to the union, and such denial does not constitute a denial of equal protection.[12]

Drug treatment and rehabilitation program.

A decision not to establish or maintain a drug treatment and rehabilitation program for prison inmates does not violate equal protection.[13] Also, the exclusion of prisoners with Immigration and Customs Enforcement (ICE) detainers from rehabilitation programs, or from halfway house placement, did not violate the Equal Protection Clause since alien prisoners, as an identifiable group, were not being treated differently from other similarly situated prisoners who were not aliens; the Bureau of Prisons (BOP) regulations classified prisoners not as aliens and nonaliens but as those having ICE detainers against them and those who did not.[14]

Education programs.

Where a state's system of allocation of educational funds for prisoners has a rational basis, resting on legitimate factors and reasonable policy considerations including the composition of the inmate population and the basic educational and vocational programs sponsored by each institution, equal protection is not denied to inmates at an institution which is allegedly allotted proportionately less money per inmate than any other state correctional institution.[15] A state-prison policy prohibiting male prisoners from enrolling in vocational classes at a women's prison likewise does not violate equal protection.[16]

Prison library.

A prison violates prisoners' equal protection right to meaningful access to the courts by unreasonably restricting their access to its law library.[17] However, where any research handicaps which the prison library imposes to preparing an adequate defense can easily be overcome by directing appointed counsel to obtain any needed materials from a more complete law library, no violation of equal protection results.[18]

The fact that some prisoners are housed a few miles from the prison law library and do not have direct access thereto, while others are housed close to the library and do have direct access thereto, does not violate equal protection where the difference in prisoner distance from the library is not arbitrary but results from a reasonable administrative interest in security and other prison objectives.[19]

Segregation of prisoners.

Restrictions imposed on prisoners confined in a segregation unit concerning education, work, entertainment programs, visitation, purchase of goods at the commissary, access to legal materials, and religious services generally do not amount to a denial of equal protection.[20] A prison's policy of restricting telephone calls made by inmates in administrative segregation does not violate the inmates' equal protection rights where justified by internal security and rehabilitation concerns.[21]

The existence of evidence indicating that certain inmates of a state correctional facility were active participants in previous bloody riots at the prison and might, if released to the general prison population, be attacked by other prisoners or themselves threaten the security of the institution provides adequate grounds for their physical segregation from the general prison population and, thus, overcomes any equal protection claim with respect to such segregation.[22]

Footnotes

1 U.S.—Davis v. Aderhold, 292 U.S. 647, 54 S. Ct. 861, 78 L. Ed. 1498 (1934).

2 N.J.—Ex parte Zienowicz, 12 N.J. Super. 563, 79 A.2d 912 (County Ct. 1951).
Wyo.—Uram v. Roach, 47 Wyo. 335, 37 P.2d 793, 95 A.L.R. 1448 (1934).
Increased monitoring units
The Bureau of Prisons (BOP) did not discriminate against Muslim prisoners housed within communication management unit (CMU), used to provide increased monitoring of high-risk inmates at a federal correctional institution (FCI), in violation of First and Fifth Amendment, even though allegedly there were a statistically disproportionate number of Muslim prisoners designated to the CMUs, since BOP did not assign prisoners to CMUs based on their religion; designation was made on basis of risk prisoner posed to public, whether prisoner had been involved in terrorism-related offenses, and whether prisoner had engaged in unmonitored communications with persons in community.
U.S.—Aref v. Holder, 774 F. Supp. 2d 147 (D.D.C. 2011).

3 Me.—Jenness v. State, 144 Me. 40, 64 A.2d 184 (1949).

4 Cal.—In re Boyd, 108 Cal. App. 541, 291 P. 845 (1st Dist. 1930).
As to the commitment of insanity acquittees, generally, see § 1369.

5 U.S.—Romero v. Schauer, 386 F. Supp. 851 (D. Colo. 1974).

6 D.C.—In re Hurt, 437 A.2d 590 (D.C. 1981).

7 Cal.—In re Gatts, 79 Cal. App. 3d 1023, 145 Cal. Rptr. 419 (4th Dist. 1978).
Length of hair
(1) The enforcement of a prison inmate hair-length requirement did not violate an inmate's equal protection rights.
U.S.—Wellmaker v. Dahill, 836 F. Supp. 1375 (N.D. Ohio 1993).
(2) The fact that prison authorities allowed women to grow their hair long, but not men, and the fact that a few prisoners might have been given more favorable treatment than the plaintiff as to length of their hair, did not show that the plaintiff had been denied equal protection.
N.Y.—Zeigler v. Riley, 67 Misc. 2d 82, 323 N.Y.S.2d 589 (Sup 1971), order aff'd, 38 A.D.2d 685, 327 N.Y.S.2d 847 (4th Dep't 1971), order aff'd, 30 N.Y.2d 617, 331 N.Y.S.2d 41, 282 N.E.2d 127 (1972).
Inmate-to-inmate correspondence
The fact that a bureau of prisons' policy prohibiting inmate-to-inmate correspondence carves out an exception for male/female relationships did not deprive a male inmate seeking to write to other male inmates of equal protection as it is within the discretion of prison officials to determine that male/female relationships further the interest of rehabilitation while male/male relationships do not.
U.S.—Schlobohm v. U.S. Atty. Gen., 479 F. Supp. 401 (M.D. Pa. 1979).
Sale of food by prisoner

Refusal to allow a prisoner to sell health food to other inmates near cost, and the sale of natural foods through the prison canteen at higher prices, did not violate the prisoners' Fourteenth Amendment rights.

U.S.—French v. Butterworth, 614 F.2d 23 (1st Cir. 1980).

As to the rational basis test for violations of equal protection, generally, see § 1279.

8 Ind.—Dodson v. State, 268 Ind. 667, 377 N.E.2d 1365 (1978).

As to equal protection as applicable to sex discrimination in punishment of crimes, generally, see § 1301.

9 Ind.—Dodson v. State, 268 Ind. 667, 377 N.E.2d 1365 (1978).

Denial of conjugal visits

An inmate's wife's status as a prior offender did not make the wife a member of a suspect class, for purposes of an equal protection claim based on denial of conjugal visits as a result of the wife's status.

U.S.—Champion v. Artuz, 76 F.3d 483, 34 Fed. R. Serv. 3d 1124 (2d Cir. 1996).

As to strict scrutiny of suspect classifications based upon race, ethnicity, or creed, see § 1282.

10 N.Y.—Muessman v. Ward, 95 Misc. 2d 478, 408 N.Y.S.2d 254 (Sup 1978).

11 U.S.—Langone v. Coughlin, 712 F. Supp. 1061 (N.D. N.Y. 1989).

12 U.S.—Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 97 S. Ct. 2532, 53 L. Ed. 2d 629 (1977).

13 Wash.—State v. Barnett, 17 Wash. App. 53, 561 P.2d 234 (Div. 1 1977).

14 U.S.—Gallegos-Hernandez v. U.S., 688 F.3d 190 (5th Cir. 2012).

15 U.S.—Weiss v. Mader, 525 F. Supp. 834 (E.D. Pa. 1981).

Rational basis shown

A state statute limiting the education available to youths convicted as adults and incarcerated in adult, county correctional facilities, but not those incarcerated in state facilities, had a rational basis, so that challengers did not show a reasonable probability, for preliminary injunction purposes, that the statute would be overturned on equal protection grounds, where several county correctional facilities did not have sufficient space to provide a complete educational program, state facilities generally had higher youth populations so that per-student costs might have been higher in county institutions, security concerns might arise in state institutions if existing education programs were discontinued, and the legislature could have found a greater need for the education of the longer term youth population in state institutions.

U.S.—Brian B. ex rel. Lois B. v. Com. of Pennsylvania Dept. of Educ., 230 F.3d 582, 148 Ed. Law Rep. 98 (3d Cir. 2000).

Spanish language classes

The failure of a state prison to provide Spanish language classes to Spanish-speaking prisoners who could not effectively communicate in English did not constitute a denial of equal protection, where prison officials demonstrated a rational basis for a program of instruction exclusively in English in that the cost of requiring all courses to be taught in both English and Spanish would eliminate many of the courses offered which served the 97% of the prison population which spoke English, and where Spanish-speaking prisoners were excluded from no course and offered a course in English as a second language to prepare them for courses taught in English.

U.S.—Pabon v. McIntosh, 546 F. Supp. 1328, 35 Fed. R. Serv. 2d 294 (E.D. Pa. 1982).

16 U.S.—Smith v. Bingham, 914 F.2d 740 (5th Cir. 1990).

17 U.S.—Walker v. Mintzes, 771 F.2d 920 (6th Cir. 1985).

Habeas relief

A petitioner who elected to proceed pro se on state court charges did not have a clearly established right under federal law to access to a law library while the petitioner was in jail before trial as required for federal habeas relief.

U.S.—Kane v. Garcia Espitia, 546 U.S. 9, 126 S. Ct. 407, 163 L. Ed. 2d 10 (2005).

18 U.S.—U.S. v. Garza, 664 F.2d 135 (7th Cir. 1981).

19 La.—Martin v. Phelps, 380 So. 2d 164 (La. Ct. App. 1st Cir. 1979).

20 U.S.—Dorrough v. Hogan, 563 F.2d 1259 (5th Cir. 1977).

Or.—Rook v. Cupp, 17 Or. App. 205, 521 P.2d 10 (1974).

21 U.S.—Benzel v. Grammer, 869 F.2d 1105 (8th Cir. 1989).

22 U.S.—U. S. ex rel. Walker v. Mancusi, 467 F.2d 51 (2d Cir. 1972).

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16B C.J.S. Constitutional Law § 1360

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

8. Confinement of Prisoners; Parole

§ 1360. Religious worship of prisoners

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3133(2), 3227, 3243, 3341(2), 3445, 3819 to 3825

Where all visiting members of the clergy are afforded similar treatment, detention of the members of the chaplaincy of one religion seeking to enter a prison, pending security clearance, does not violate the rights of prisoners who are followers of that religion to equal protection.

Where all visiting members of the clergy are afforded similar treatment, detention of the members of the chaplaincy of one religion seeking to enter a prison, pending security clearance, does not violate the rights of prisoners who are followers of that religion to equal protection.[1] The equal protection rights of the prison inmates of one religion are not violated by the claimed fact that inmates of that religion are prevented on a few occasions from attending religious services without passes.[2] Likewise, a state-prison policy allowing prison-employed chaplains to have contact visits with "death watch" inmates on a regular basis, while prohibiting a nonemployee Catholic priest from having contact visits with death watch inmates, does not deprive a Roman Catholic inmate who is on death watch of equal protection of the laws, even though all of the prison chaplains are Protestants, where the prison allows outside religious leaders to visit inmates on a regular basis, all inmates have equal access to outside religious representatives, and all inmates have equal access to institutional chaplains.[3]

The Equal Protection Clause does not require that every religious sect or group within a prison—however few in numbers—must have identical facilities or personnel; it requires only that prison officials afford inmates reasonable opportunities to exercise the religious freedom guaranteed by the First and Fourteenth Amendments.[4] Thus, a Jewish prison inmates' rights to equal protection are not violated by the lack of a facility for their exclusive use for religious worship and the alleged lack of a secured facility for such purpose where no Christian denominations have a room for their exclusive use and the small number of Jewish inmates at such prison justifies the policy of requiring them to share their place of worship with other groups.[5] Also, the holding of a banquet is not a fundamental interest, and, thus, restrictions placed on holding a banquet by Jewish prison inmates do not violate equal protection where they are rationally related to legitimate interests in maintaining prison discipline and security.[6]

The policy of a prison administration of using a prisoner's committed name rather than the prisoner's Muslim name, which is religiously neutral on its face, without proof of discrimination against or among such inmates on the basis of religious conviction, is not violative of equal protection.[7] Prison authorities can properly distinguish between the supervised use of candles and incense in the chapel and a request for the unsupervised use of such in an inmate's cell notwithstanding the fact that such items are allegedly for use in the practice of religion.[8] Equal protection does not require that a prisoner be afforded weekend releases to practice a religion, where no other inmates have been granted relief to that extent, and other inmates who have been released to attend religious functions have been classified as minimum security prisoners while the petitioner has been classified as a maximum security prisoner.[9]

A prohibition against group activity without the supervision of prison authorities does not violate the equal protection rights of inmates who wish to engage in unsupervised group prayer, even where certain unsupervised events are permitted, since group prayer involves an unauthorized authority structure set up by participating inmates.[10]

CUMULATIVE SUPPLEMENT

Cases:

Muslim inmate sufficiently alleged that prison chaplain deprived him of his right to equal protection under the law, by alleging that chaplain prevented inmate from participating in the Muslim feast of Eid-al-Fitr because he was a member of the Nation of Islam, one of several sects of Islam, while permitting members of the majority Al-Islam sect to participate in the Eid feast, and that chaplain made this facially discriminatory distinction even though inmate was similarly situated in all material respects to adherents of Al-Islam, given their mutual observance of the central tenets of Islam as well as inmate's Level I inmate status. U.S. Const. Amend. 14, § 1. Maye v. Klee, 915 F.3d 1076 (6th Cir. 2019).

Inmate, who was denied access to Native American faith group sweat lodge, was not treated differently than other inmates at state correctional institution, and thus could not succeed on equal protection claim against prison officials, where no inmate at the correctional institution was provided access to sweat lodge ceremonies. U.S. Const. Amend. 14. Pevia v. Hogan, 443 F. Supp. 3d 612 (D. Md. 2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S.—Glasshofer v. Thornburgh, 514 F. Supp. 1242 (E.D. Pa. 1981), aff'd, 688 F.2d 821 (3d Cir. 1982).

2 U.S.—Glasshofer v. Thornburgh, 514 F. Supp. 1242 (E.D. Pa. 1981), aff'd, 688 F.2d 821 (3d Cir. 1982).
Decision to exclude homosexual ministry

The decision to exclude a homosexual ministry from holding group worship services, where other ministries are so permitted, is proper where the differentiation is predicated on a demonstrated correlation between inmate homosexuality and prison violence and internal disruption.
U.S.—Brown v. Johnson, 743 F.2d 408 (6th Cir. 1984).
As to the rational basis test for violations of equal protection, generally, see § 1279.

3 U.S.—Card v. Dugger, 709 F. Supp. 1098 (M.D. Fla. 1988), judgment aff'd, 871 F.2d 1023 (11th Cir. 1989).

4 U.S.—McFaul v. Valenzuela, 684 F.3d 564 (5th Cir. 2012).

5 U.S.—Glasshofer v. Thornburgh, 514 F. Supp. 1242 (E.D. Pa. 1981), aff'd, 688 F.2d 821 (3d Cir. 1982).

6 U.S.—Glasshofer v. Thornburgh, 514 F. Supp. 1242 (E.D. Pa. 1981), aff'd, 688 F.2d 821 (3d Cir. 1982).
As to strict scrutiny of classifications involving fundamental rights, generally, see § 1277.
As to strict scrutiny of suspect classifications based upon race, ethnicity, or creed, see § 1282.

7 U.S.—Masjid Muhammad-D. C. C. v. Keve, 479 F. Supp. 1311 (D. Del. 1979).

8 U.S.—Childs v. Duckworth, 509 F. Supp. 1254 (N.D. Ind. 1981), judgment aff'd, 705 F.2d 915 (7th Cir. 1983).

9 N.J.—State v. Richardson, 130 N.J. Super. 63, 324 A.2d 914 (Law Div. 1974).

10 U.S.—Cooper v. Tard, 855 F.2d 125 (3d Cir. 1988).

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16B C.J.S. Constitutional Law § 1361

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

8. Confinement of Prisoners; Parole

§ 1361. Transfer of prisoners

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3133(2), 3227, 3243, 3341(2), 3445, 3819 to 3825

Nonconsensual transfers of prisoners are not per se violative of equal protection rights.

Nonconsensual transfers of prisoners are not per se violative of equal protection rights.[1] Prison officials have discretion to effect the transfer of a prisoner from a place of confinement for whatever reason, or for no reason, and the exercise of such discretion does not implicate equal protection claims.[2] Equal protection is not violated by the fact that prisoners at a particular prison are given certain procedural rights, including notice and hearing, before receiving certain punishments but not before being transferred to another prison for disciplinary purposes.[3]

The transfer of a state prisoner from one prison to another without holding a state mandated hearing does not, without more, deny such a prisoner equal protection.[4] However, a prisoner who alleges that the prisoner was not given a hearing before an interprison transfer, and who alleges that the transfer was approved to mask the errors of prison officials in the investigation and disposition of a disciplinary report against the prisoner, sufficiently states a claim of equal protection denial.[5]

Footnotes

1 U.S.—Stinson v. Nelson, 525 F.2d 728 (9th Cir. 1975); Colbeth v. Civiletti, 516 F. Supp. 73 (S.D. Ind. 1980).
N.J.—State v. Blanford, 105 N.J. Super. 56, 251 A.2d 138 (App. Div. 1969).

2 U.S.—Kivela v. U.S. Atty. Gen., 523 F. Supp. 1321 (S.D. N.Y. 1981), aff'd, 688 F.2d 815 (2d Cir. 1982).
Minn.—State v. Carpenter, 282 N.W.2d 910 (Minn. 1979).

3 U.S.—Curry-Bey v. Jackson, 422 F. Supp. 926 (D.D.C. 1976).

4 U.S.—Shango v. Jurich, 681 F.2d 1091 (7th Cir. 1982) (disapproved of on other grounds by, Jones v. Lane, 568 F. Supp. 1113 (N.D. Ill. 1983)).

5 U.S.—Stringer v. Rowe, 616 F.2d 993 (7th Cir. 1980).

16B C.J.S. Constitutional Law § 1362

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

8. Confinement of Prisoners; Parole

§ 1362. Early release

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3133(2), 3227, 3243, 3341(2), 3445, 3819 to 3825

Because the seriousness of the offense committed is only one factor to be considered in determining whether to grant a prisoner temporary release, the mere fact that different prisoners convicted of more serious offenses have been admitted to such a program might reflect no more than the proper exercise of administrative discretion and, thus, does not demonstrate an invidious discrimination against such prisoner.

Because the seriousness of the offense committed is only one factor to be considered in determining whether to grant a prisoner temporary release, the mere fact that different prisoners convicted of more serious offenses have been admitted to such program might reflect no more than the proper exercise of administrative discretion and, thus, does not demonstrate an invidious discrimination against such prisoner.[1] Prisoners do not have a fundamental right to release before the expiration of a valid sentence, and, therefore, the rational basis test applies to an equal protection challenge to an early release statute.[2] Even if inmates with criminal records, drug histories, and histories of escape similar to the plaintiff's have been permitted to participate in a prerelease program, the denial of the plaintiff's application for temporary home furlough on the stated grounds of the plaintiff's criminal record, drug history, and bail jumping does not deny the plaintiff equal protection since the grounds articulated for the denial might only be the highlights of a catalogue of valid objections, any one of which might support the decision.[3]

The denial of "earned work credits" to prisoners on "mandatory release" and not to those on furloughs, work releases, or other temporary releases does not violate equal protection.[4]

Work-release program.

The fact that at least two maximum security prisons in a state have each established a functioning work-release program, but the institution in which the plaintiff is confined has established no such program, is not violative of equal protection absent evidence that there is no reasonable basis for the discretionary standard in the laws or that the laws are arbitrarily or capriciously applied.[5] A statute allowing the trial judge to recommend that restitution or reparation be imposed as a condition of work release does not violate equal protection because the decision to impose such conditions is discretionary and indigency can be considered in making that decision.[6]

A state's requirement that sex offenders obtain special certification by the corrections board in order to be eligible for work release also does not violate equal protection.[7] Likewise, a regulation permitting consideration of past sex-related crimes in determining which inmates should be eligible for work-release status is a reasonable regulation, when considered in light of a legislative policy to the same effect, so that reliance placed upon an inmate's prior sex offense convictions to deny the inmate less restrictive custody status does not deny the inmate equal protection.[8]

Where in light of a prisoner's historical record of parole violation the denial of work release to such prisoner is neither arbitrary, capricious, nor discriminatory, no cognizable equal protection claim is stated by such prisoner.[9]

A complaint filed by a state prisoner sufficiently alleges a cause of action predicated on the theory that prison officials violated the prisoner's rights to equal protection by purposefully denying the prisoner a hearing before terminating work-release status where hearings are customarily afforded to other inmates similarly situated.[10]

Footnotes

1 U.S.—Marciano v. Coughlin, 510 F. Supp. 1034 (E.D. N.Y. 1981).
No violation of equal protection shown
County jails' early release credit policies awarding only 15% credit to most prisoners, which was less than that allowed under the policy of the state department of corrections, and limiting prisoners' access to work programs, particularly as applied to presentence detainees, did not violate equal protection; the state's substantial interest in maintaining prisoner discipline, particularly by preventing flight from prosecution and preserving local control over jails, justified the disparate treatment of prisoners.
Wash.—Petition of Fogle, 128 Wash. 2d 56, 904 P.2d 722 (1995).
Equal protection rights violated
A statute allowing judicial release for any offender sentenced to less than five years' imprisonment upon service of 180 days, but precluding judicial release for an offender sentenced to at least five years' imprisonment until after the offender has served five years, violated the equal protection rights of a defendant who received a sentence of exactly five years, and thus, the statute was null and void as applied to the defendant since the defendant would be released from imprisonment before the prisoner could become eligible for judicial release.
Ohio—State v. Strausbaugh, 87 Ohio Misc. 2d 31, 688 N.E.2d 1149 (C.P. 1997).

2 U.S.—Wottlin v. Fleming, 136 F.3d 1032 (5th Cir. 1998); Copeland v. Matthews, 768 F. Supp. 779 (D. Kan. 1991).
As to strict scrutiny of classifications involving fundamental rights, generally, see § 1277.

As to the rational basis test for violations of equal protection, generally, see § 1279.

3 U.S.—Rowe v. Cuyler, 534 F. Supp. 297 (E.D. Pa. 1982), aff'd, 696 F.2d 985 (3d Cir. 1982).

4 Ariz.—State v. Robertson, 131 Ariz. 73, 638 P.2d 740 (Ct. App. Div. 1 1981).

5 U.S.—Jamieson v. Robinson, 641 F.2d 138 (3d Cir. 1981).

6 N.C.—State v. Lambert, 40 N.C. App. 418, 252 S.E.2d 855 (1979).

7 U.S.—Finley v. Staton, 542 F.2d 250 (5th Cir. 1976).

8 Ala.—Bryant v. State, 494 So. 2d 874 (Ala. Crim. App. 1986).

9 U.S.—Young v. Hunt, 507 F. Supp. 785 (N.D. Ind. 1981).

10 U.S.—Durso v. Rowe, 579 F.2d 1365 (7th Cir. 1978).

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16B C.J.S. Constitutional Law § 1363

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

8. Confinement of Prisoners; Parole

§ 1363. Good-time credits

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3133(2), 3227, 3243, 3341(2), 3445, 3819 to 3825

In deciding an equal protection challenge to a statute treating prisoners differently in the application of good-time credits, the court must determine whether such distinction rationally furthers some legitimate, articulated state purpose.

In deciding an equal protection challenge to a statute treating prisoners differently in the application of good-time credits, the court must determine whether such distinction rationally furthers some legitimate, articulated state purpose.[1] Applying a good time credit statute only to convicted prisoners, and not to pretrial detainees, is rationally related to the statute's rehabilitative purpose, and thus, the statute does not violate the equal protection clauses of the state or federal constitutions under the rational basis test.[2]

The legislature is not barred from determining that prisoners convicted of certain serious sex offenses should not be granted good-conduct sentence reductions generally available to all other prisoners,[3] including other prisoners convicted of offenses of the same general kind,[4] nor is equal protection denied by a statute denying good time credit to inmates serving life sentences.[5] The revocation of an inmate's good time following such inmate's escape likewise does not deny the inmate equal protection.[6]

A distinction drawn by a regulation regarding compensatory good time between persons serving sentences in the penitentiary after conviction and those serving sentences in the county jail prior to conviction, because of their inability to make bond, may violate the constitutional guarantee of equal protection.[7] If a criminal defendant, for no other reason than indigency, is unable to secure presentence freedom by posting bail, then the defendant is entitled, under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, to good-time credit for the time spent in the county detention facility, prior to sentencing, to the same extent that the law allows good-time credit to a criminal defendant who is able to post bail and, thus, to serve the entirety of a sentence in the state correctional facility.[8]

Footnotes

1 Conn.—Frazier v. Manson, 176 Conn. 638, 410 A.2d 475 (1979).

Ill.—South v. Franzen, 90 Ill. App. 3d 595, 46 Ill. Dec. 83, 413 N.E.2d 523 (4th Dist. 1980).

Rational basis test applicable

The rational basis test for equal protection review applied to an inmate's claim that a statute granting good time credits to parolees, but not to probationers, violated equal protection.

Mont.—McDermott v. Montana Dept. of Corrections, 2001 MT 134, 305 Mont. 462, 29 P.3d 992 (2001).

Equal protection violated

A state statute allowing an inmate to receive work credits only when the inmate is incarcerated in an institution within the jurisdiction of the New Jersey state board violated equal protection, as applied to a New Jersey inmate who, under the statute, would not be entitled to receive work credits for the period of time the inmate was incarcerated in Pennsylvania serving concurrent Pennsylvania and New Jersey sentences, since there was no rational basis to make such a distinction.

N.J.—Van Winkle v. New Jersey Dept. of Corrections, 370 N.J. Super. 40, 850 A.2d 548 (App. Div. 2004).

No violations of equal protection shown

(1) A statute which reduced the minimum sentence of prisoners in District of Columbia prisons did not create a disadvantaged class of female prisoners in federal prisons, did not discriminate against a suspect class or infringe on fundamental right, was rationally related to legitimate government interests, and, therefore, did not violate the equal protection rights of female prisoners in federal prisons who had been convicted in district courts.

U.S.—Jackson v. Thornburgh, 702 F. Supp. 9 (D.D.C. 1988), judgment aff'd, 907 F.2d 194 (D.C. Cir. 1990).

(2) A statute governing good time credits did not violate equal protection, even though it applied only to inmates housed in facilities within the District of Columbia and not to District offenders assigned to federal facilities, since the statute was rationally related to the goal of alleviating severe overcrowding within District of Columbia correctional institutions.

U.S.—Copeland v. Matthews, 768 F. Supp. 779 (D. Kan. 1991).

As to strict scrutiny of classifications involving fundamental rights, generally, see § 1277.

As to the rational basis test for violations of equal protection, generally, see § 1279.

As to strict scrutiny of suspect classifications based upon race, ethnicity, or creed, see § 1282.

2 U.S.—Chestnut v. Magnusson, 942 F.2d 820 (1st Cir. 1991).

Mass.—McNeil v. Commissioner of Correction, 417 Mass. 818, 633 N.E.2d 399 (1994).

Mental health custody

A statute which provides for reduction in criminal sentences for good behavior for individuals in the custody of the corrections commissioner, but not for persons in the custody of the mental health commissioner, rationally promotes a legitimate state policy and thus did not deny equal protection.

Vt.—Trivento v. Commissioner of Corrections, 135 Vt. 475, 380 A.2d 69 (1977).

As to credit towards a prisoner's sentence for presentence time spent in custody, see § 1356.

As to equal protection considerations with respect to confinement of mentally disabled individuals, generally, see § 1365.

3 Mass.—Amado v. Superintendent, Massachusetts Correctional Institution at Walpole, 366 Mass. 45, 314 N.E.2d 432 (1974).

4 Mass.—Amado v. Superintendent, Massachusetts Correctional Institution at Walpole, 366 Mass. 45, 314 N.E.2d 432 (1974).

5 Ind.—Jennings v. State, 270 Ind. 699, 389 N.E.2d 283 (1979).

Wis.—Parker v. Percy, 105 Wis. 2d 486, 314 N.W.2d 166 (Ct. App. 1981).

6 Mich.—Pfefferle v. Michigan Corrections Commission, 86 Mich. App. 366, 272 N.W.2d 563 (1976).

7 Cal.—People v. Sage, 26 Cal. 3d 498, 165 Cal. Rptr. 280, 611 P.2d 874 (1980).

Ill.—Hampton v. Rowe, 88 Ill. App. 3d 352, 43 Ill. Dec. 511, 410 N.E.2d 511 (3d Dist. 1980).

As to equal protection considerations with respect to bail, generally, see § 1323.

8 Mont.—MacPheat v. Mahoney, 2000 MT 62, 299 Mont. 46, 997 P.2d 753 (2000), as amended on denial of reh'g, (Mar. 30, 2000).

Level of scrutiny

Denial of good-time credit to indigent defendants for time served in county jail prior to trial and sentencing, due to their inability to make bail, violates Equal Protection Clause of Fourteenth Amendment under intermediate level of scrutiny where statutory good-time credit provisions permit those who serve their entire sentence either in county jail or a state institution to receive credit for one-third of their total sentence, while those unable to obtain pretrial release receive credit for only one-third of sentence as reduced by number of days spent in pretrial detention.

Wash.—Matter of Mota, 114 Wash. 2d 465, 788 P.2d 538 (1990).

As to equal protection considerations with respect to sentencing and punishment of indigents, see § 1357.

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16B C.J.S. Constitutional Law § 1364

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

8. Confinement of Prisoners; Parole

§ 1364. Parole release guidelines

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3133(2), 3227, 3243, 3341(2), 3445, 3819 to 3825

Parole release guidelines, as well as criteria governing revocation of parole, must not be violative of equal protection.

Parole release guidelines established by statute or regulation must not be violative of equal protection.[1] However, the State may make reasonable classifications in its rules for the parole of prisoners,[2] and the exclusion of habitual offenders[3] or of persons convicted of certain crimes[4] from the benefits of the parole statute is not a denial of equal protection. Thus, for example, a statute requiring a prisoner to serve one-third of a sentence, if convicted of certain named crimes, before becoming eligible for parole, does not result in a denial of equal protection.[5]

Procedures used in parole hearings must be in conformity with equal protection,[6] and a parole commission's consideration of a prisoner's prior criminal conduct is not violative of equal protection.[7] However, if there are no meaningful reasons why the parole board gives one person a different minimum sentence from another, there is a violation of equal protection.[8]

Since the claim that the classification of a prisoner's offense for parole purposes violates equal protection does not involve a suspect classification or a fundamental right, it will be rejected unless the parole commission's action is patently arbitrary and bears no rational relationship to a legitimate governmental interest.[9]

Parole revocation.

A defendant is not denied equal protection by a parole commission's refusal to hold an early revocation hearing, allegedly based on the defendant's inability to post cash bail, where the procedures followed are a rational means to attain legitimate goals.[10] In determining whether a legislative classification denying bail to parolees pending final resolution of revocation hearings while providing bail to probationers violates equal protection, the court has only to determine whether the legislative classification is rationally designed to further a legitimate state purpose since a parolee's interest in release from incarceration is not among fundamental interests and parolees are not a suspect class.[11]

The refusal to count the time spent on parole upon the resumption of a prison sentence after parole revocation does not violate equal protection,[12] and the failure to credit a prisoner's sentence with the time spent in local jails after the revocation of the prisoner's parole, but before the prisoner's return to state prison, does not deny the prisoner equal protection.[13]

Footnotes

1 U.S.—Young v. U. S. Parole Com'n, 682 F.2d 1105 (5th Cir. 1982).
Cal.—In re Thomson, 104 Cal. App. 3d 950, 164 Cal. Rptr. 99 (4th Dist. 1980).

2 Wis.—State ex rel. Niederer v. Cady, 72 Wis. 2d 311, 240 N.W.2d 626 (1976).
Rational relationship shown
Sentencing scheme, under which defendants convicted of sex offenses and other crimes were entitled to mandatory parole, but defendants who committed only sex offenses were entitled to discretionary parole, was rationally related to public safety and thus did not violate Equal Protection Clause of Fourteenth Amendment even though defendants convicted of multiple crimes may have received parole earlier than defendants convicted only of sex offenses; longer sentences with mandatory parole provisions were more serious sentences than shorter sentences with discretionary parole provisions.
Colo.—People v. Black, 915 P.2d 1257 (Colo. 1996).
As to the rational basis test for violations of equal protection, generally, see § 1279.

3 N.J.—Mahoney v. Parole Bd., 10 N.J. 269, 90 A.2d 8 (1952).
Grant of discretionary power to parole board
A statute which gives a parole board discretionary power to grant parole on the basis of factors other than the length of the prisoner's sentence did not deny the defendant equal protection as there is no constitutional or inherent right of a convicted person to be conditionally released before expiration of a valid sentence.
Colo.—People v. Alexander, 797 P.2d 1250 (Colo. 1990).
As to application of equal protection principles to habitual offender statutes, see § 1355.
As to equal protection considerations with respect to early release, generally, see § 1362.

4 Kan.—State v. McDaniel, 228 Kan. 172, 612 P.2d 1231 (1980).
N.C.—State v. Dunlap, 298 N.C. 725, 259 S.E.2d 893 (1979).
Persons convicted of murder
(1) The legislature could rationally distinguish the parole eligibility of defendants convicted of first-degree murder on the basis of whether they were sentenced in a capital proceeding, and thus, a capital defendant sentenced to life in prison was not deprived of equal protection by the fact that the prosecutor had the sought the death penalty.
Md.—Richardson v. State, 89 Md. App. 259, 598 A.2d 1 (1991), judgment aff'd, 332 Md. 94, 630 A.2d 238 (1993).

(2) A parole eligibility statute does not discriminate against first and second-degree murder convictees, in violation of their equal protection or due-process rights, by providing a 20-year period of time before such convictees are eligible for parole consideration while allowing other life prisoners to be considered for parole within 15 years.

Ind.—Adams v. State, 575 N.E.2d 625 (Ind. 1991).

As to equal protection considerations with respect to the death penalty and life imprisonment, see § 1354.

5 Idaho—Standlee v. State, 96 Idaho 849, 538 P.2d 778 (1975).

6 Ind.—Young v. Duckworth, 274 Ind. 59, 408 N.E.2d 1253 (1980).

7 U.S.—Kirby v. U.S., 463 F. Supp. 703 (D. Minn. 1979).

8 N.Y.—Didousis v. New York State Bd. of Parole, 89 Misc. 2d 358, 391 N.Y.S.2d 327 (Sup 1977).

9 U.S.—Young v. U. S. Parole Com'n, 682 F.2d 1105 (5th Cir. 1982).

As to strict scrutiny of classifications involving fundamental rights, generally, see § 1277.

As to strict scrutiny of suspect classifications based upon race, ethnicity, or creed, see § 1282.

10 U.S.—Doyle v. Elsea, 658 F.2d 512 (7th Cir. 1981).

11 Ill.—People ex rel. Tucker v. Kotsos, 68 Ill. 2d 88, 11 Ill. Dec. 295, 368 N.E.2d 903 (1977).

12 U.S.—Firkins v. State of Colo., 434 F.2d 1232 (10th Cir. 1970).

Pa.—Gaito v. Pennsylvania Bd. of Probation and Parole, 38 Pa. Commw. 199, 392 A.2d 343 (1978).

13 Minn.—State ex rel. Bruno v. Tahash, 280 Minn. 14, 157 N.W.2d 514 (1968).

As to equal protection considerations with respect to credit for time served in prison, see § 1356.

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

9. Confinement, Examination, and Commitment of Mentally Disordered or Addicted Defendants

§ 1365. Criminal commitment procedures

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3073(1), 3073(2), 3106, 3140, 3142, 3143, 3169, 3170 to 3176, 3211, 3227, 3780 to 3782, 3785, 3787 to 3791, 3793 to 3798, 3800, 3814, 3826, 3827, 3833

Criminal commitment procedures are subject to the Equal Protection Clause of the Fourteenth Amendment.

Criminal commitment procedures are subject to the Equal Protection Clause of the Fourteenth Amendment,[1] such as commitment of the defendant for incompetency to stand trial.[2] A criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others.[3]

Except in collateral proceedings in a criminal case to determine the mental capacity of the defendant to stand trial, all proceedings to confine a defendant because of the defendant's mental condition, including that of being dangerous to the defendant, as well as to other members of society, must be brought through civil proceedings under the Equal Protection Clause.[4] Where a defendant is properly committed due to an inability to stand trial, the defendant is not denied equal protection.[5] Moreover, equal protection is not violated by a statute prohibiting a defendant committed because his inability to stand trial to be released without approval

of the court,[6] and equal protection does not mandate the immediate release of such a defendant upon the determination that the defendant poses no threat to the safety of others.[7]

A policy at a maximum security facility, prohibiting patients charged with crimes who are unfit to stand trial from receiving unescorted grounds passes and off-grounds passes, does not violate equal protection since such pass proscription is reasonably related to the facility's hybrid interest in security and treatment.[8] Similarly, imposition of more onerous restrictions on patients in a forensic unit of a psychiatric center than those imposed on civilly committed patients housed elsewhere at the center is a rational means of promoting the legitimate end of institutional security and thus does not violate the Equal Protection Clause since hospital officials can reasonably conclude that civilly committed patients, as a group, represent less risk than those in the forensic unit.[9]

Incompetence confinement may be considered a special form of pretrial detention concerned with the restoration of a specific mental state without which the criminal process could not proceed rather than postconviction rehabilitative treatment related to a finding of criminal conduct.[10] Thus, an individual confined for hospital treatment as incompetent to stand trial is not denied equal protection to the extent that the individual, unlike offenders committed for the treatment of drug addiction, cannot earn good conduct and participation credits against a subsequent prison sentence.[11]

Examination for competency or sanity.

It is the continued confinement of a defendant beyond a reasonable period necessary to determine the lack of fitness to proceed and the expected duration of any incapacity, and not an initial commitment for the foregoing purpose upon a suggestion of mental incompetence, that violates equal protection.[12]

A statute allowing a criminal defendant to have a second psychiatric examination by a physician chosen and paid for by the defendant does not deny an indigent accused equal protection of the law by not authorizing a second psychiatric examination at state expense.[13] However, a state must, as a matter of equal protection, provide indigents with the basic tools of an adequate defense, including medical experts in support of an insanity plea or determination of competency.[14]

Footnotes

1 Md.—Martin v. Director, Patuxent Inst., 18 Md. App. 505, 308 A.2d 212 (1973).
Mo.—State v. Kee, 510 S.W.2d 477 (Mo. 1974).
Denomination not determinative
Commitment proceedings, whether denominated civil or criminal, are subject to the Equal Protection Clause of the Fourteenth Amendment.
U.S.—Specht v. Patterson, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967).

2 Minn.—State v. Bauer, 299 N.W.2d 493 (Minn. 1980).
Dangerousness essential
Cal.—Conservatorship of Hofferber, 28 Cal. 3d 161, 167 Cal. Rptr. 854, 616 P.2d 836 (1980).
Not suspect class
Mentally ill persons are not a suspect class, for purposes of an equal protection analysis, and thus, an equal protection claim brought by such a person is subject only to rational basis scrutiny.
S.D.—State v. Laible, 1999 SD 58, 594 N.W.2d 328 (S.D. 1999).
As to strict scrutiny of classifications involving fundamental rights, generally, see § 1277.
As to the rational basis test for violations of equal protection, generally, see § 1279.
As to strict scrutiny of suspect classifications based upon race, ethnicity, or creed, see § 1282.

3 U.S.—Jackson v. Indiana, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972).

4 D.C.—Thomas v. U. S., 418 A.2d 122 (D.C. 1980).
Tex.—Ex parte Meade, 550 S.W.2d 679 (Tex. Crim. App. 1977).
5 Haw.—State v. Raitz, 63 Haw. 64, 621 P.2d 352 (1980).
6 Ill.—People v. Dublin, 63 Ill. App. 3d 387, 20 Ill. Dec. 354, 380 N.E.2d 31 (2d Dist. 1978).
7 Haw.—State v. Raitz, 63 Haw. 64, 621 P.2d 352 (1980).
8 U.S.—Johnson v. Brelje, 521 F. Supp. 723 (N.D. Ill. 1981), order supplemented on other grounds, 525 F. Supp. 183 (N.D. Ill. 1981) and judgment aff'd, 701 F.2d 1201 (7th Cir. 1983).
9 U.S.—Buthy v. Commissioner of Office of Mental Health of New York State, 818 F.2d 1046 (2d Cir. 1987).
10 Cal.—People v. Waterman, 42 Cal. 3d 565, 229 Cal. Rptr. 796, 724 P.2d 482 (1986).
11 Cal.—In re Huffman, 42 Cal. 3d 552, 229 Cal. Rptr. 789, 724 P.2d 475 (1986).
12 Haw.—State v. Raitz, 63 Haw. 64, 621 P.2d 352 (1980).
13 U.S.—Williams v. Wyrick, 664 F.2d 193 (8th Cir. 1981).
14 § 1321.

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16B C.J.S. Constitutional Law § 1366

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

9. Confinement, Examination, and Commitment of Mentally Disordered or Addicted Defendants

§ 1366. Sex offenders or sexually dangerous persons

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3780 to 3782, 3785, 3787 to 3791, 3793 to 3798, 3800, 3814, 3826, 3827, 3833

A defendant is entitled to equal protection in determinations that the defendant constitutes a danger to the public and, therefore, should be committed or continued in custody as a sex offender.

Equal protection does not prohibit a state from classifying sex offenders in a special category and providing special procedures for dealing with a person in this group.[1] However, a defendant is entitled to equal protection in determinations that the defendant constitutes a danger to the public and, therefore, should be committed or continued in custody as a sex offender.[2]

Sex offenders do not comprise a suspect class as would warrant strict scrutiny for an equal protection violation.[3]

A commitment in lieu of sentence following conviction as a sex offender is insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to others.[4] The fact that, under statutes so providing, persons convicted of crimes and thereafter found to be sexually dangerous may be subjected to commitment to a treatment center until cured or rehabilitated does not constitute a denial of equal protection solely because the operation of the statutes

does not reach nonconvicts or convicts who are not sexually dangerous.[5] The fact that substantial differences exist between commitment proceedings for a sex offender and those for more general civil commitments does not violate equal protection where a rational basis exists for such classifications which justifies different procedures for treating the two groups.[6]

Thus, equal protection does not require that convicted sex offenders receive the whole panoply of commitment procedures afforded to civilly committed persons if the commitment is a sentencing alternative and the commitment on that basis is limited to the length of the criminal sentence.[7] However, equal protection does require that any significant procedural rights granted to persons involuntarily committed for mental illness must be extended to persons involuntarily committed as sexually dangerous persons, at least when such commitment extends beyond the limit of the maximum sentence which may be imposed on the sexually dangerous person following that person's conviction.[8]

Footnotes

1 U.S.—State of Minnesota ex rel. Pearson v. Probate Court of Ramsey County, 309 U.S. 270, 60 S. Ct. 523, 84 L. Ed. 744, 126 A.L.R. 530 (1940).

Neb.—State v. Little, 199 Neb. 772, 261 N.W.2d 847 (1978).

Sexual predator classification and registration

Sexual predator classification and registration statute did not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution by using "clear and convincing" standard of proof while sex offenders charged in the indictment as sexually violent predators were entitled to have the jury determine specification by proof beyond a reasonable doubt; there were punitive aspects of the sexually violent predator specification in contrast to nonpunitive notice and registration requirements.

Ohio—State v. Williams, 88 Ohio St. 3d 513, 2000-Ohio-428, 728 N.E.2d 342 (2000).

Sentencing under sexual predatory offender statute

Sentencing a defendant for forcible rape under a sexual predatory offender statute, based on a prior sexual assault for which the defendant had not received a jury trial, did not violate the defendant's rights to due process or equal protection.

Mo.—State v. Gilyard, 979 S.W.2d 138 (Mo. 1998).

2 Wis.—Buchanan v. State, 41 Wis. 2d 460, 164 N.W.2d 253 (1969) (overruled on other grounds by, State ex rel. Farrell v. Stovall, 59 Wis. 2d 148, 207 N.W.2d 809 (1973)).

3 U.S.—Litmon v. Harris, 768 F.3d 1237 (9th Cir. 2014).

Registration of sex offenders

Sex offenders were not members of a suspect class, and no fundamental right was at stake in action in which registrant disputed whether the registrant could be required to continue to register under the Sex Offenders Registration Act (SORA) after an order was issued expunging from the record a guilty plea to two counts of sexual abuse of a minor child, for which the registrant had received two five-year deferred sentences, and therefore the rational basis test applied to the registrant's equal protection challenge based on a statute providing that SORA did not apply to persons who received criminal history records expungement for a conviction in another state of a crime to which SORA otherwise would be applicable.

Okla.—Butler v. Jones ex rel., State ex rel., Oklahoma Dept. of Corrections, 2013 OK 105, 321 P.3d 161 (Okla. 2013).

4 U.S.—Humphrey v. Cady, 405 U.S. 504, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972).

Cal.—People v. Colvin, 114 Cal. App. 3d 614, 171 Cal. Rptr. 32 (5th Dist. 1981).

5 Mass.—In re Andrews, 368 Mass. 468, 334 N.E.2d 15 (1975).

6 Ill.—People v. Pembrock, 62 Ill. 2d 317, 342 N.E.2d 28 (1976).

Reasonable distinction permitted

For judicial review and release purposes, persons committed under a sex crimes law can reasonably be distinguished from those committed under a mental health act.

Wash.—In re Detention of D.A.H., 84 Wash. App. 102, 924 P.2d 49 (Div. 1 1996).

As to the rational basis test for violations of equal protection, generally, see § 1279.

7 U.S.—U. S. ex rel. Demeter v. Yeager, 418 F.2d 612 (3d Cir. 1969).
Minn.—Fritz v. State, 284 N.W.2d 377 (Minn. 1979).
Different standards of dangerousness permissible
Wis.—State v. Hungerford, 84 Wis. 2d 236, 267 N.W.2d 258 (1978).

8 Mass.—In re Andrews, 368 Mass. 468, 334 N.E.2d 15 (1975).

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PART VI. Privileges and Immunities; Equal Protection

XVII. Subjects and Applications of Equal Protection Guarantee

C. Equal Protection Guarantee as Applied to Criminal Offenses and Prosecutions

9. Confinement, Examination, and Commitment of Mentally Disordered or Addicted Defendants

§ 1367. Narcotics addicts

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3073(1), 3073(2), 3106, 3140, 3142, 3143, 3169, 3170 to 3176, 3211, 3227, 3780 to 3782, 3785, 3787 to 3791, 3793 to 3798, 3800, 3814, 3826, 3827, 3833

A narcotics addicts rehabilitation statute does not constitute a denial of equal protection by excluding from rehabilitation commitment, in lieu of penal incarceration, convicted addicts with two or more prior felony convictions.

A narcotics addicts rehabilitation statute does not constitute a denial of equal protection by excluding from rehabilitation commitment, in lieu of penal incarceration, convicted addicts with two or more prior felony convictions.[1] A statute granting treatment to addicts charged with crimes instead of prosecution, and which denies treatment eligibility to persons charged with certain crimes, does not violate equal protection.[2]

In failing to accord a convicted addict a jury trial on the issue of addiction, before certifying the convicted party to the jurisdiction of a narcotics commission, a law violates the constitutional guarantee of equal protection where a jury trial is given in a proceeding instituted against a noncriminal addict.[3]

Footnotes

1 U.S.—Marshall v. U.S., 414 U.S. 417, 94 S. Ct. 700, 38 L. Ed. 2d 618 (1974).

2 Ill.—People v. Perine, 82 Ill. App. 3d 610, 37 Ill. Dec. 845, 402 N.E.2d 847 (1st Dist. 1980).

3 N.Y.—People v. Fuller, 24 N.Y.2d 292, 300 N.Y.S.2d 102, 248 N.E.2d 17 (1969).

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9. Confinement, Examination, and Commitment of Mentally Disordered or Addicted Defendants

§ 1368. Persons acquitted on ground of insanity

Topic Summary | References | Correlation Table

West's Key Number Digest

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A statute which requires the indefinite commitment of any person who raises the defense of insanity and is acquitted of an offense solely on that ground must be upheld against an equal protection attack if there is a rational basis for the scheme it creates.

In protecting society by providing for the involuntary confinement of a defendant acquitted on the ground of insanity, the State must provide equal protection of the law.[1] Equal protection prohibits the judicial commitment of an insanity acquittee without an underlying medical judgment that the party is mentally ill.[2] Nonetheless, a statute which requires the indefinite commitment of any person who raises the defense of insanity and is acquitted of an offense solely on that ground must be upheld against an equal protection attack if there is a rational basis for the scheme it creates.[3]

Subject to the availability of either an extended commitment or a civil commitment, principles of equal protection preclude persons committed to state institutions following acquittal of a criminal offense on grounds of insanity from being retained in institutional confinement beyond the maximum term of punishment for the underlying offense.[4]

A statute exempting from paying the costs of institutional care all persons criminally committed, except for mental-health acquittees, does not violate equal protection.[5]

CUMULATIVE SUPPLEMENT

Cases:

Rational basis review, rather than strict scrutiny, applied to equal protection challenge raised against statutory amendment that granted trial courts discretion to strike firearm enhancements in the case of convicted criminal defendants, but not in the case of insanity acquittees; the issue was the duration of the commitment period, not whether a deprivation of liberty would occur. U.S. Const. Amend. 14; Cal. Const. art. 1, § 7; Cal. Penal Code § 12022.53. People v. K.P., 241 Cal. Rptr. 3d 324 (Cal. App. 4th Dist. 2018).

[END OF SUPPLEMENT]

Footnotes

1 Mo.—State v. Kent, 515 S.W.2d 457 (Mo. 1974).
Verdict of guilty but mentally ill
A statute providing for a verdict of guilty but mentally ill did not deny the defendant due process and equal protection rights to the insanity defense.
Ind.—Resneck v. State, 499 N.E.2d 230 (Ind. 1986).

2 U.S.—Powell v. State of Fla., 579 F.2d 324 (5th Cir. 1978).
Subsequent finding of sanity
A person committed to a state hospital after being found not guilty by reason of insanity, who was subsequently found sane pursuant to a writ of habeas corpus, was entitled to an unconditional release, and any statutory provisions to the contrary deprived that person of the right to equal protection.
Ohio—Holderbaum v. Watkins, 44 Ohio App. 2d 253, 73 Ohio Op. 2d 256, 337 N.E.2d 800 (3d Dist. Allen County 1974), judgment aff'd, 42 Ohio St. 2d 372, 71 Ohio Op. 2d 333, 328 N.E.2d 814 (1975).

3 U.S.—U.S. v. Jackson, 553 F.2d 109 (D.C. Cir. 1976).
Kan.—Application of Jones, 228 Kan. 90, 612 P.2d 1211 (1980).
Statute rationally advancing legitimate public purpose
Statute defining insanity defense did not implicate capital-murder defendant's right to equal protection, whether on its face or as applied to defendant; statute violated no fundamental right and made no determinations based on suspect classification, and by differentiating between groups of offenders, statute rationally advanced legitimate public purpose of limiting scope of the insanity defense and reducing number of criminally culpable offenders avoiding criminal punishment.
Utah—State v. Lafferty, 2001 UT 19, 20 P.3d 342 (Utah 2001).
As to strict scrutiny of classifications involving fundamental rights, generally, see § 1277.
As to the rational basis test for violations of equal protection, generally, see § 1279.
As to strict scrutiny of suspect classifications based upon race, ethnicity, or creed, see § 1282.
As to equal protection considerations with respect to the death penalty, see § 1354.

4 Cal.—In re Moye, 22 Cal. 3d 457, 149 Cal. Rptr. 491, 584 P.2d 1097 (1978).
Credit for precommitment confinement
Equal protection mandates that, in calculating the maximum duration of an incompetency commitment based on the insanity of a criminal defendant, credit must be given for precommitment confinement attributable to the same criminal prosecution.
Cal.—In re Banks, 88 Cal. App. 3d 864, 152 Cal. Rptr. 111 (4th Dist. 1979).

As to equal protection considerations with respect to credit for time served, see § 1356.

5 **Rational basis**

U.S.—Fetterusso v. State of N.Y., 898 F.2d 322 (2d Cir. 1990).

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9. Confinement, Examination, and Commitment of Mentally Disordered or Addicted Defendants

§ 1369. Persons acquitted on ground of insanity—Commitment

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Constitutional Law 3073(1), 3073(2), 3106, 3140, 3142, 3143, 3169 to 3176, 3211, 3227, 3780 to 3782, 3785, 3787 to 3791, 3793 to 3798, 3800, 3814, 3826, 3827, 3833

An insanity acquittal is insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to others.

An insanity acquittal is insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to others.[1] On the other hand, persons committed after insanity acquittals may be distinguishable, as a group, from other groups of persons, including those who have committed less serious offenses constituting felonies, who are subject to civil commitment, in that an insanity acquittee has already been shown beyond a reasonable doubt to have committed at least one dangerous act.[2] Thus, differences in commitment procedures for persons found not guilty of a crime by reason of insanity and civil committees do not necessarily violate equal protection,[3] and a scheme for the commitment of insanity acquittees does not violate equal protection on the ground that insanity acquittees qualify for commitment if they are insane or dangerous while a different standard, that is, insane and dangerous, is used for persons other than insanity acquittees.[4]

A statutory scheme providing for the mandatory commitment of a specified number of days for evaluation and treatment of a defendant acquitted of a violent crime by reason of insanity does not violate equal protection.[5]

Footnotes

1 U.S.—Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968).
N.Y.—People v. Escobar, 110 Misc. 2d 1089, 443 N.Y.S.2d 534 (Sup 1981).
Application of procedures relating to commitment of criminal defendant
A person acquitted of a criminal charge by reason of insanity fell within the class of individuals possibly suffering from mental illness and within the subclass therein of those who might be dangerously mentally ill, but State, which enacted elaborate statutory safeguards to provide for protection of society from people who were dangerously mentally ill, could not consistent with equal protection requirements arbitrarily subject such person to substantially different procedures relating to the commitment of the criminal defendant and deny the protection and safeguards afforded others by civil commitment procedure statutes.
Ind.—Wilson v. State, 259 Ind. 375, 287 N.E.2d 875 (1972).
Meaningful determination of illness and dangerousness required
Equal protection requires that the standard for commitment of a person who has been acquitted, or against whom a charge has been dismissed, by reason of insanity be cast in terms of continuing mental illness and dangerousness to self or others, not in terms of continuing insanity alone, and that some trier of fact make a meaningful determination as to whether the defendant is actually within that standard.
N.J.—State v. Krol, 68 N.J. 236, 344 A.2d 289 (1975).
Requisite rights
When there is a hearing on question of whether a person acquitted of a crime by reason of insanity meets the criteria for civil commitment, equal protection requires that the insanity acquittee have following rights: notice of the right to a hearing; notice of the right to counsel and the right to have counsel appointed if the person cannot afford counsel; the right to confront and cross-examine witnesses and to offer evidence; the right to subpoena witnesses and to require that testimony be given in person or by deposition from any physician upon whose evaluation the decision may rest; the notice of right to have individualized treatment plan; the notice of right to be examined by physician of person's own choosing, at the person's own expense; and the right to have appointed a representative or guardian ad litem.
Ga.—Clark v. State, 245 Ga. 629, 266 S.E.2d 466 (1980).

2 U.S.—Harris v. Ballone, 681 F.2d 225, 34 Fed. R. Serv. 2d 204 (4th Cir. 1982).
Affirmative defenses
The fact that those who successfully raise the affirmative defense of insanity are automatically committed, while those who successfully raise other affirmative defenses are unconditionally released, has a rational relationship to legitimate state interests and does not deprive those who are acquitted because of insanity of equal protection.
Colo.—People v. Fetty, 650 P.2d 541 (Colo. 1982).

3 Colo.—People v. Fetty, 650 P.2d 541 (Colo. 1982).
Del.—Matter of Lewis, 403 A.2d 1115 (Del. 1979).
Certificates of two physicians
Commitment of a defendant to a state hospital pursuant to a statute authorizing such a commitment upon rendition of an insanity verdict against a defendant, without the certificates of two physicians, did not deny equal protection to the defendant even though such certificate would have been required in a civil commitment proceeding.
Del.—Mills v. State, 256 A.2d 752 (Del. 1969).

4 U.S.—Harris v. Ballone, 681 F.2d 225, 34 Fed. R. Serv. 2d 204 (4th Cir. 1982).

5 Cal.—People v. De Anda, 114 Cal. App. 3d 480, 170 Cal. Rptr. 830 (2d Dist. 1980).

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9. Confinement, Examination, and Commitment of Mentally Disordered or Addicted Defendants

§ 1370. Persons acquitted on ground of insanity—Release

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If an insanity acquittee is deprived of substantial safeguards as to release that are provided to persons civilly committed, such an individual is denied equal protection.

If an insanity acquittee is deprived of substantial safeguards as to release that are provided to persons civilly committed, such individual is denied equal protection.[1] Equal protection requires that standards governing the release of insanity acquittees who have been confined for a period equal to the maximum sentence authorized for their crimes be substantially the same as the standards applicable to civil committees.[2] However, a statute that fails to provide a patient, who has been found not guilty by reason of insanity and has been committed to a state hospital, the right to a jury trial on the issue of the patient's eligibility for placement in a community mental health program does not violate equal protection where civil committees similarly are denied such a right.[3]

Where an insanity-acquitted individual has been in detention for a considerable period of time, any continued detention should be governed by the same standard of burden of proof applied to civil commitments.[4] However, differences in standards of release

for persons found not guilty of a crime by reason of insanity and civil committees do not necessarily violate equal protection.[5] Thus, release provisions for the insanity acquitted are valid even though they differ from civil commitment procedures by authorizing court review of the hospital's decision to release such patients.[6]

Equal protection does not require that the State treat insanity acquittees and civil committees alike in allocating the burden of proof and fixing the standard of proof required on release petitions.[7] Thus, an insanity acquittee is not denied equal protection by a requirement that the acquittee bear the burden of proving fitness for release while other civil committees do not.[8]

An insanity acquittee is not deprived of equal protection simply because a judge refuses to order the release of the insanity acquittee after the hospital administrator recommends a discharge.[9]

Footnotes

1 Del.—Mills v. State, 256 A.2d 752 (Del. 1969).

2 U.S.—U.S. v. Ecker, 543 F.2d 178 (D.C. Cir. 1976).

3 Cal.—People v. Tilbury, 54 Cal. 3d 56, 284 Cal. Rptr. 288, 813 P.2d 1318 (1991).

4 U.S.—U.S. v. Brown, 478 F.2d 606 (D.C. Cir. 1973).

5 Colo.—People v. Fetty, 650 P.2d 541 (Colo. 1982).

6 Ga.—Skelton v. Slaton, 243 Ga. 426, 254 S.E.2d 704 (1979).

Off-grounds privileges

Ill.—People v. Valdez, 79 Ill. 2d 74, 37 Ill. Dec. 297, 402 N.E.2d 187 (1980).

7 Fla.—Hill v. State, 358 So. 2d 190 (Fla. 1st DCA 1978).

8 Ga.—Clark v. State, 245 Ga. 629, 266 S.E.2d 466 (1980).

Hearing after acquittal

Equal protection does not prohibit placing the burden of proof on a defendant at a hearing, after a finding of not guilty by reason of insanity, to show that the defendant is not presently suffering from a mental disease or defect which causes the defendant to be a danger to public peace or safety since the defendant by the affirmative defense of insanity has admitted that the defendant was insane at the time of the acts in question and has, by reason of insanity, committed a criminal act.

Alaska—State v. Alto, 589 P.2d 402 (Alaska 1979).

9 U.S.—Powell v. State of Fla., 579 F.2d 324 (5th Cir. 1978).